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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

Appellate Case No. 2017-001554

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SC Court of Appeals

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutton Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners,

Of Which Town of Arcadia Lakes is the Appellant/Respondent,

vs.

South Carolina Department of Health and Environmental Control, Respondent, and Roper Pond, LLC, Respondent/Appellant.

**RECORD ON APPEAL
VOLUME I OF IV**

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June 7, 2018

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson,
Linda Z. Jackson, Robert E. Williams, Barbara
S. Williams, Elizabeth M. Walker, Louis E.
Spradlin, Mary Helen Spradlin, Thomas Hutto
Utsey, Tony Sinclair, Aaron Small, Bette
Small, Gene F. Starr, M.D., Elaine J. Starr,
Sanford T. Marcus, Ruth L. Marcus, and
Steven Brown.

Petitioners,

vs.

South Carolina Department of Health and
Environmental Control and Roper Pond, LLC,

Respondents.

Docket No. 09-ALC-07-0069-CC

**ORDER FOR ATTORNEYS' FEES AND
COSTS AND FOR SANCTIONS
PURSUANT TO SCALC RULE 72**

This matter comes before the South Carolina Administrative Law Court ("ALC" or "Court") on the Third Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to SCALC Rule 72 ("Petition") filed by Respondent Roper Pond, LLC ("Roper Pond") on November 30, 2015. Roper Pond seeks an award of attorneys' fees and costs from Petitioner Town of Arcadia Lakes ("Town") pursuant to S.C. CODE ANN. § 15-77-300, which provides, *inter alia*, that fees will be awarded against a political subdivision of the State in a civil action when the political subdivision acted without substantial justification in pressing its claims. Roper Pond also requests the Court to issue sanctions against the Town pursuant to SCALC Rule 72.

By order dated August 3, 2015, the Court bifurcated the issues regarding fees and sanctions to first determined whether they were proper and then, if necessary, determine the amount to be awarded. On March 15, 2017, the Court issued an order finding that Roper Pond is entitled to an award of attorneys' fees and costs and that sanctions against the Town are proper. On April 3, 2017, Roper Pond filed its Supplemental Brief in Support of Respondent Roper Pond, LLC's Third Amended Petition for Fees, Costs and Sanctions. On April 21, 2017, the Town filed Town of Arcadia Lakes' Response to Roper Pond's Supplemental Brief. A hearing on determination of the amount of fees, costs, and sanctions to be awarded was held on May 30,

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JUN 14 2017

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SC ADMIN. LAW COURT

2017. For the reasons set forth below, the Court finds that Roper Pond is entitled to an award of attorneys' fees and costs under S.C. CODE ANN. § 15-77-300 in the amount of \$205,283.84 and that sanctions against the Town pursuant to SCALC Rule 72 in the amount of \$200,000.00 are proper, but payable to the Clerk of this Court.

I. ATTORNEYS' FEES AND COSTS

Having determined that Roper Pond is entitled to an award of attorneys' fees and costs under S.C. CODE ANN. § 15-77-300 ("State Action Statute"), the Court must determine the amount to be awarded to Roper Pond. Section 15-77-300(B) establishes the following factors to be applied in making this determination:

- (1) the nature, extent, and difficulty of the case;
- (2) the time devoted;
- (3) the professional standing of counsel;
- (4) the beneficial results obtained; and
- (5) the customary legal fees for similar services.

S.C. CODE ANN. § 15-77-300(B). This provision of the State Action Statute further provides that the Court "must make specific written findings regarding each factor listed above in making the award of attorney's fees." *Id.* The Town argues that the lodestar method is the proper method for determining the amount of reasonable attorneys' fees under the State Action Statute and cites to the Supreme Court holding in *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008), in support of this argument. Although the *Layman* court applied the lodestar method in determining an award of attorneys' fees under the State Action Statute, at that time the State Action Statute did not include the factors to be applied as now set forth in S.C. CODE ANN. § 15-77-300(B). In 2010, two years after the *Layman* decision, the General Assembly amended the State Action Statute to establish these specific factors. 2010 S.C. Act. No. 125. Therefore, the factors set forth in the State Action Statute—not the lodestar method—are now applicable to determining the amount of reasonable attorneys' fees under Section 15-77-300.

The Town also cited to *Maybank v. BB&T Corp.*, 416 S.C. 541, 787 S.E.2d 498 (2016), to support its argument that the lodestar method should be applied in determining the award of fees in this matter. In *Maybank*, the court applied the lodestar method for the determining reasonable attorneys' fees; however, the award of attorneys' fees in that case was made pursuant to the South Carolina Unfair Trade Practices Act, S.C. CODE ANN. §§ 39-5-10 et seq. ("UTPA").

Specifically, Section 39-5-140 of the UTPA provides that “[u]pon the finding by the court of a violation of this article, the court shall award to the person bringing such action under this section reasonable attorney’s fees and costs.” S.C. CODE ANN. § 39-5-140(a). However, unlike the State Action Statute, the UTPA does not codify factors to be evaluated in determining reasonable attorneys’ fees. Therefore, the application of the lodestar method in *Maybank* does not mandate the application of the lodestar method for an award under the State Action Statute.

Additionally, in *South Carolina Dept. of Transp. v. Revels*, 411 S.C. 1, 766 S.E.2d 700 (2014), our Supreme Court addressed the applicability of the lodestar method to a fee-shifting statute which contains express factors to be consider in determining reasonable attorneys’ fees. In *Revels*, the Court analyzed an award of attorneys’ fees under the South Carolina Eminent Domain Procedure Act, S.C. CODE ANN. §§ 28-2-10 *et seq.* (“Eminent Domain Act”). Section 28-2-510 of the Eminent Domain Act prescribes that the following be provided in a prevailing landowner’s application for attorneys’ fees: “The application shall show that the landowner has prevailed, state the amount sought, and include an itemized statement from an attorney or expert witness representing or appearing at trial in behalf of the landowner stating the fee charged, the basis therefor, the actual time expended, and all actual expenses for which recovery is sought.” S.C. CODE ANN. § 28-2-510(B)(1). In *Revels*, the Supreme Court held that the Court of Appeals erred in finding that *Layman* governed the award of attorneys’ fees and further held that the terms of Section 28-2-510 govern the determining of attorneys’ fees to be awarded:

Having found that *Layman* is not controlling, we direct our attention to the express terms of section 28-2-510. As we interpret section 28-2-510, we conclude the General Assembly intended for attorneys’ fees to be awarded based on a **constellation of factors**. Specifically, section 28-2-510(B)(1) mandates that in order for a prevailing landowner to recover reasonable attorneys’ fees he or she must submit an application for fees “necessarily incurred.” S.C. CODE ANN. § 28-2-30(14) (2007) (defining “litigation expenses” for prevailing landowner). This application must contain an “itemized statement” from the landowner’s attorney, which includes: (1) “the fee charged;” (2) the basis for the fee charged; (3) “the actual time expended;” and (4) “all actual expenses for which recovery is sought.” *Id.* § 28-2-510(B)(1).

411 S.C. at 10–11, 766 S.E.2d at 705 (emphasis added). Like Section 28-2-510 of the Eminent Domain Act, the General Assembly enacted an amendment to the State Action Statute to include the “constellation of factors” to be evaluated in determining an award of attorneys’ fees.

Therefore, the lodestar method is inapplicable to a determination of reasonable attorneys' fees under the State Action Statute.

In determining the amount of reasonable attorneys' fees to be awarded to Roper Pond, the Court addresses each of the factors in the State Action Statute below.

A. The nature, extent, and difficulty of the case.

By letter dated December 15, 2008, Respondent South Carolina Department of Health and Environmental Control ("Department" or "DHEC") granted Roper Pond coverage under the 2006 NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities ("State General Permit"), authorizing land-disturbing activities on 9.6 acres in association with construction of a multi-family residential housing development to be located off Trenholm Road in Richland County. Although this contested case was brought to challenge a basic DHEC authorization for coverage under the State General Permit for storm water discharges associated with construction activities, Petitioners raised numerous legal theories in this contested case, many of which Roper Pond argued were outside of the subject matter jurisdiction of this Court. Petitioners' Request for Contested Case Hearing, filed on February 16, 2009, included more than five pages, reciting eleven grounds for appeal, several of which included multiple sub-parts. The grounds raised by Petitioner included alleged violations of South Carolina Regulations 61-9, 61-68, and 61-101. Petitioners also argued that an individual permit under Section 404 of the Clean Water Act was required.

Roper Pond filed a motion to dismiss Petitioners' claims related to the 401 water quality certification and authorization under a United States Corps of Engineers ("Corps") Nationwide Permit. (Respondent Roper Pond, LLC's Motion to Dismiss dated April 6, 2009). On June 17, 2009, the Court issued a Consent Order on Roper Pond, LLC's Motion to Dismiss, dismissing the claim challenging the 401 water quality certification and Corps authorization under Nationwide Permit No. 39. However, numerous legal theories were advanced by Petitioners throughout the contested case. Moreover, counsel for the Town acknowledged that certain of those legal theories were "somewhat novel." (Email attached to Affidavit of W. Thomas Lavender, Jr., dated April 27, 2017). At the conclusion of the hearing on the merits, this Court requested that Petitioners provide a post-hearing filing outlining the issues presented at the hearing on the merits. On October 9, 2009, Petitioners filed an outline of issues which detailed more than six pages of issues to be determined by the Court.

This Court issued a 29-page Final Order and Decision following the contested case hearing. Although the authorization challenged by Petitioners is governed by DHEC regulations, Petitioners' claims in this contested case include authorizations under programs administered by DHEC and the Corps. While those claims were found to be without merit, the issues raised by Petitioners involved the complex interplay of state and federal statutes and regulations. The Court finds that the nature, extent, and difficulty of this case support an award of attorneys' fees in the amount Roper Pond has requested.

B. The time devoted.

Petitioners filed their request for contested case hearing on February 16, 2009. The Petitioners filed a notice of appeal of this Court's decision to the Court of Appeals on April 20, 2010. On June 12, 2013, the Court of Appeals issued a decision affirming this Court's Final Order and Decision. Petitioners appealed the Court of Appeals decision to the Supreme Court, which granted Petitioners' writ for certiorari on August 22, 2014. The Supreme Court heard oral arguments on March 18, 2015, and issued an order dismissing the case as moot on April 9, 2015. On April 28, 2015, the Clerk of the Supreme Court remitted the case to this Court along with a copy of the Supreme Court's dismissal and the decision of the Court of Appeals. Counsel for Roper Pond offered an affidavit with a list of the daily time worked by each Nexsen Pruet attorney in this litigation from February 11, 2009, through March 18, 2015, the date of oral arguments before the Supreme Court. (Affidavit of Joan W. Hartley dated July 16, 2015).

During the contested case before this Court, Nexsen Pruet billed Roper Pond a total of 397.4 hours for time expended through the filing of the Notice of Appeal to the Court of Appeals on April 20, 2010. Approximately 73 percent of this total time was billed by Joan Hartley at a substantially lower hourly rate based on her years of practice. The nature of the case required counsel for Roper Pond to work with Roper Pond's engineer and wetlands consultant to address Petitioners' claims. Counsel for Roper Pond also coordinated with counsel for South Carolina Department of Health and Environmental Control on matters related to discovery and in preparation for the hearing on the merits. (Affidavit of W. Thomas Lavender, Jr. dated April 3, 2017, ¶¶ 5, 6). The parties identified more than 50 proposed exhibits prior to the hearing on the merits. (Hrg. Tr., pp. 4-7). Counsel for Roper Pond also drafted a proposed order following the hearing on the merits and responded to a motion for reconsideration and for a stay following this Court's issuance of the Final Order and Decision on January 21, 2010.

During the appeal to the Court of Appeals and the Supreme Court, Nexsen Pruet billed Roper Pond a total of 304.7 hours. Again, approximately 72 percent of this time was billed for Joan Hartley at the lower hourly rate. Although the Supreme Court dismissed the grant of certiorari in this matter as moot, this dismissal was issued following oral argument. Therefore, Nexsen Pruet's representation of Roper Pond on appeal included completion of the appeal before the Court of Appeals and the Supreme Court.

The Town argues that counsel for Roper Pond must provide detailed time entries describing each task performed by counsel for Roper Pond in this matter and that failure to provide such detail is fatal to Roper Pond's request for attorneys' fees. The Supreme Court recently addressed this argument in the *Maybank* case, which as noted above, involved an award of attorneys' fees pursuant to the UTPA.¹ In *Maybank*, the Supreme Court held that such detailed time entries were not required for the court to determine the amount of attorneys' fees to be awarded under the statute:

Appellants argue the affidavit of attorneys' fees and costs submitted by Maybank's counsel was inadequate and lacked the necessary detail that would enable Appellants to respond. They suggest Maybank failed to provide detailed billing statements to identify how the billed hours correlated to the claims alleged, especially since Maybank prevailed on only five of his eleven claims, and the Trust lost on all its claims. Moreover, Appellants suggest the insufficiency in the billing statements make it difficult to ascertain and delineate the work completed in furtherance of the UTPA claim—which is the only claim upon which attorneys' fees and costs may be awarded.

We find all of Maybank's claims shared the same common facts and required combined efforts throughout the litigation process. The trial court's reduction of fees by twenty percent accounts for a distinction in the claims and the time allotted to defend claims unrelated to the UTPA. We find this to be a reasonable estimation. *Cf. Haley Nursery Co. v. Forrest*, 298 S.C. 520, 524, 381 S.E.2d 906, 909 (1989) (finding a reduction in fees and costs reflected that the fees and costs sought were not solely from the UTPA action).

Maybank, 416 S.C. at 580, 787 S.E.2d at 518. The defendants in *Maybank* argued that the UTPA claim was the only claim for which the plaintiff was entitled to attorneys' fees, but the case had involved eleven total claims. The defendants therefore argued that detailed time entries were

¹ The Town cites to a number of federal cases in support of its argument that actual time records must be submitted for an award of attorneys' fees under federal statutes. However, since the South Carolina Supreme Court has addressed this issue in *Maybank*, there is no basis for looking to other jurisdictions for guidance.

needed to determine which time was devoted to the UTPA. The Supreme Court held that the trial court's 20 percent reduction in the award of attorneys' fees sufficiently accounted for the time expended on other claims since "all of Maybank's claims shared the same common facts and required combined efforts throughout the litigation process." *Id.* The basis for the reduction in the award of attorneys' fees in *Maybank* is inapplicable in this case. Under the State Action Statute, Roper Pond is entitled to an award of attorneys' fees as to all claims pressed by the Town, and Roper Pond prevailed on all of those claims. Therefore, there is no basis for requiring detailed time entries for the time expended by counsel for Roper Pond in this case. Moreover, even if there were, the Supreme Court has rejected that argument in *Maybank*. The list of daily time expended by each Nexsen Pruet attorney in this case is sufficient to support an award of attorneys' fees under the State Action Statute.

The Town further argues that Roper Pond is not entitled to an award of attorneys' fees for all of the attorneys' fees incurred in this matter because the Town was only one of 17 petitioners in this case. The Supreme Court addressed this argument in the *Layman* case. In *Layman*, the defendants argued that the award of attorneys' fees should be reduced because the plaintiffs offered an affidavit with "the hours spent on the litigation of the case (designated on the chart below as 'Total Hours Expended'), with no distinction between the time associated with the TERI participants' claims giving rise to the instant case, and time associated with the Working Retirees' claims, which were remanded." The Supreme Court rejected this argument:

Although the record indicates that Working Retirees constituted roughly one-third of the class of plaintiffs in *Layman*, we do not find it necessary to adjust the total hours expended by this proportion in order to arrive at a reasonable fee in this case. Not only were the same legal theories advanced on behalf of both the TERI participants and the Working Retirees, making their claims virtually indistinguishable, but more importantly, guiding jurisprudence explicitly holds that "a party need not be successful as to all issues in order to be found to be a prevailing party" for purposes of awarding attorneys' fees under the state action statute.⁸ *Heath*, 302 S.C. at 182, 394 S.E.2d at 711. Only in an abundance of caution, however, do we reduce the number of total hours expended by three percent (3%), rounded down to the nearest tenth, in order to account for any time devoted solely to the Working Retirees' claims, thereby arriving at what we view as a "reasonable" number of hours expended on the TERI participants' claims (appearing as "Net Hours Expended" in the chart below). *See Edmonds*, 658 F.Supp. at 1135 n. 18, 1147 n. 44 (performing a lodestar analysis and adjusting the time devoted to litigating the underlying case by two to three percent in order to account for the fact that "some hours may not be properly compensable").

Layman, 376 S.C. at 459–60, 658 S.E.2d at 333–34 (footnote omitted). While the Supreme Court adjusted the actual time expended by the attorneys in that class action by 3%, this adjustment was made “[o]nly in an abundance of caution” because the claims of a group within the class had been remanded. *Layman*, 376 S.C. at 359–60, 658 S.E.2d at 333–34. However, no such adjustment is warranted in this case because all of the petitioners advanced the identical claims. There was no factual or legal distinction between the claims of the Town and those of the other petitioners.

Additionally, even if an adjustment were warranted, it would not be necessary because counsel for Roper Pond discounted its bills in this matter by approximately ten percent. According to the detail of time expended by Nexsen Pruet attorneys on this matter, the value of the time actually expended on this matter totals \$217,048.50. (Affidavit of Joan W. Hartley dated July 16, 2015). However, Nexsen Pruet billed Roper Pond a total of \$195,068 in attorneys’ fees from February 11, 2009 through March 18, 2015. Nexsen Pruet thus provided Roper Pond with a reduction of \$21,980.50 on the billing in this matter. Therefore, the value of actual time expended in this litigation has already been adjusted by approximately ten percent. Given that adjustment, Roper Pond is entitled to the total time actually billed by Nexsen Pruet in this matter.

The Town argues that the detailed time entries must be submitted because the exclusion of hours that are excessive, redundant, or otherwise unnecessary is required by the lodestar method. The South Carolina appellate courts have cited the factor on time expended as “the time necessarily devoted to the case” in applying the lodestar method. *See, e.g., Layman*, 376 S.C. at 458, 658 S.E.2d at 333; *Hunkler v. Frey*, 2012 WL 10862808, *3 (S.C. Ct. App. Oct. 3, 2012). However, as discussed above, the lodestar method is not applicable to an award of attorneys’ fees under the State Action Statute. Additionally, when the General Assembly amended the State Action Statute in 2010 to include the factors to be considered, this factor was stated as “the time devoted.” S.C. CODE ANN. § 15-77-300(B)(2). Unlike the lodestar method, the State Action Statute does not include the “necessary” requirement for determining the reasonable time expended on the litigation.

The Town further argues that Roper Pond is only entitled to attorneys’ fees for the time expended for the appeal to the Court of Appeals and Supreme Court and is not entitled to attorneys’ fees for the time before this Court. In support of this argument, the Town cites to the South Carolina District Court decision in *Just v. Spartanburg Community College*, No. 3:12-CV-03115-JFA, 2013 WL 3833063 (D.S.C. Jul. 23, 2013). In *Just*, the federal district court

interpreted “civil action” in the State Action Statute to exclude a hearing before the South Carolina State Ethics Commission. Citing to *McDowell v. S.C. Dep’t of Soc. Servs.*, 304 S.C. 539, 405 S.E.2d 830 (1991), the District Court stated that “the South Carolina Supreme Court has already decided that an administrative proceeding is not a civil action within the meaning of §15-77-300.” *Just*, 2013 WL 3833063 at *4. Both *Just* and *McDowell* can be distinguished from this case. In *Just*, the State Ethics Commission initiated the agency decision at issue when it filed formal charges against the plaintiff. There was no “agency decision” prior to the actions of the State Ethics Commission. In this case, the issuance of the authorization under the State General Permit by DHEC is the agency decision.

Similarly, in *McDowell*, the plaintiff appealed the denial of her food stamp application by the South Carolina Department of Social Services (“DSS”). The Supreme Court held that she was not entitled to attorneys’ fees under the State Action Statute for the hearing before DSS because “at this point the agency was not ‘pressing its claim’ in litigation against appellant but was merely functioning as an administrative decision-maker.” *McDowell*, 304 S.C. at 543, 405 S.E.2d at 833. The Court held that DSS was pressing its claim without substantial justification when the agency “relied on an erroneous legal conclusion in defending its decision in proceedings before the circuit court and Court of Appeals.” *Id.* at 542-43, 405 S.E.2d at 833.

In this case, the comparable administrative proceeding to the DSS hearing in *McDowell* would be a final review conference before the South Carolina Board of Health and Environmental Control (“Board”). If a party appealed a DHEC agency decision following a final review conference before the Board and that party prevailed in this Court, the party could seek attorneys’ fees against DHEC under the State Action Statute, but the attorneys’ fees for the final review conference before the Board would be excluded under *McDowell*. However, the attorneys’ fees incurred for the contested case before this Court could be awarded if at that point, DHEC was litigating the agency decision without substantial justification. Moreover, pursuant to S.C. CODE ANN. § 44-1-60, a decision of the Board following a final review conference is the “final agency decision.” S.C. CODE ANN. § 44-1-60(F)(2) (“After the final review conference, the board, its designee, or a committee of three members of the board appointed by the chair shall issue a written final agency decision based upon the evidence presented. . . . Within thirty calendar days after the receipt of the decision an applicant, permittee, licensee, or affected person desiring to contest the final agency decision may request a contested case hearing before the

Administrative Law Court, in accordance with the Administrative Procedures Act.”). Unlike the DSS hearing in *McDowell*, in a contested case, this Court is not “merely functioning as an administrative decision-maker.” *McDowell*, 304 S.C. at 543, 405 S.E.2d at 833.

Additionally, a hearing before DSS is an informal hearing before a hearing officer or hearing committee which issues the “final administrative determination by the Department.” S.C. CODE REG. § 114-130(J)(2). Again, the DSS hearing in *McDowell* is comparable to a final review conference before the DHEC Board. In contrast, a contested case hearing before this Court follows the issuance of a final agency decision by DHEC. S.C. CODE ANN. § 44-1-60 (G). While the ALC is part of the executive branch, the Court is a “**a court of record** within the executive branch of the government of this State.” S.C. CODE ANN. § 1-23-500 (emphasis added). A contested case is subject to the South Carolina Rules of Procedure for the ALC, which includes rules on formal discovery, motions, evidence, and other procedures comparable to a trial before the state circuit court and incorporates the South Carolina Rules of Civil Procedure and South Carolina Appellate Court Rules to “be applied to resolve questions not addressed by these rules.” SCALC Rule 68. It would be contrary to the public policy considerations manifest in the State Action Statute to exclude attorneys’ fees before this Court under the *McDowell* ruling. In particular, the *McDowell* case was decided in 1991, two years prior to the creation of the ALC in 1993. S.C. CODE ANN. § 1-23-500. Additionally, the *McDowell* case involved continued litigation by the agency which issued the agency decision being challenged. In this case, the Town was not the agency issuing the final agency decision on appeal. Nor was the Town subject to the final agency decision on appeal to this Court. The Town is a third party which became a party to this contested case only because it chose to challenge DHEC’s authorization to Roper Pond under the State General Permit. For all of these reasons, the *McDowell* decision does not preclude an award of attorneys’ fees to Roper Pond for the contested case before this Court.

Finally, the Town argues that the total hours expended by Nexsen Pruet from February 11, 2009 through March 18, 2015 improperly includes the time expended for Roper Pond’s Petition for Fees and Costs. The Town cites to *McDowell* in support of this argument. However, in *McDowell*, the Supreme Court held that the “appellant is entitled to attorney’s fees under § 15-77-300 for this litigation and appeal seeking to secure such fees.” 304 S.C. at 544, 405 S.E.2d at 833. Therefore, a party may recover attorneys’ fees for work required to secure fees under the State Action Statute. However, even if that were not the case, Nexsen Pruet discounted its fees by

\$21,980.50, which is more than sufficient to cover the fees for preparing the original petition for fees in 2010.

C. The professional standing of counsel.

W. Thomas Lavender, Jr., had primary responsibility for representing Roper Pond in this litigation. Mr. Lavender received his juris doctorate from the University of South Carolina Law in 1976 and has been licensed to practice law in South Carolina since 1976. He is admitted to practice before all South Carolina Courts, the Federal Court for the District of South Carolina, the Fourth Court of Appeals and the United States Supreme Court. His practice has primarily focused on environmental and regulatory matters, including litigation in state and federal court and before the ALC. (Exhibit A, Affidavit of W. Thomas Lavender, Jr., ¶ 3). Mr. Lavender has regularly appeared before the ALC since its creation. This Court is familiar with his work product, preparation, and general ability in representing clients in matters of this nature.

Joan Hartley has practiced under Mr. Lavender's supervision for more than ten years. Ms. Hartley received her juris doctorate from the University of South Carolina Law School in 2004. She has been licensed to practice law in South Carolina since 2004 and in North Carolina since 2007. She is admitted to practice before all South Carolina Courts, all North Carolina Courts, the Federal Court for the District of South Carolina, and the Federal Court for the Eastern District of North Carolina. (Exhibit A, Affidavit of W. Thomas Lavender, Jr., ¶ 4). This Court is also familiar with her work product, preparation, and general ability in representing clients in matters of this nature.

Additionally, Roper Pond offered the affidavit of Karen A. Crawford, who is a partner in the law firm of Nelson Mullins Riley & Scarborough, and practices in the areas of environmental law and litigation, toxic torts, and product liability. Ms. Crawford attests that the fees charged by Nexsen Pruet in this matter are "within the range of hourly rates charges by other lawyers with comparable experience for matters of this nature." (Affidavit of Karen A. Crawford). Among other consideration, this statement is based on Ms. Crawford's "experience working with Mr. Lavender and Ms. Hartley on various matters over the years having provided an understanding of their capabilities in such matters." The professional standing of the attorneys representing Roper Pond supports an award of the total hours billed at the hourly rates billed by Nexsen Pruet in this matter.

D. The beneficial results obtained.

Nexsen Pruet successfully defended the DHEC authorization in this Court and in the appellate courts. Given the defensive posture of Roper Pond in this action, this successful defense is the only “beneficial result” which Roper Pond could obtain in this matter. The beneficial results obtained for Roper Pond in this matter supports an award of attorneys’ fees in the amount requested by Roper Pond.

E. The customary legal fees for similar services.

Over the course of the contested case and appeal from 2009 to 2015, the hourly rates for counsel for Roper Pond were:

W. Thomas Lavender, Jr.	\$370 - \$440 per hour
Henry W. Brown	\$300 per hour
Joan Hartley	\$220 - \$310 per hour

The Town argues that Roper Pond has not established the prevailing market rates in the community. Counsel for Roper Pond attests that the fees billed in this matter at the standard billing rate for those attorneys. In *Layman*, the Supreme Court found that the calculation of fees for lead counsel properly “uses Mr. Lewis’s premium hourly rate which he typically reserves for ‘difficult’ cases. *Layman*, 376 S.C. at 459, 658 S.E.2d at 333. Estates, Inc. (“Estates”), provided development and marketing services for the Roper Pond project. Since 1997 Nexsen Pruet has represented Estates in more than 100 matters, including real estate transactions and financing, employment matters, environmental matters, contract and construction disputes, and related litigation. Estates engaged Nexsen Pruet to represent Roper Pond based on their long-standing relationship with Nexsen Pruet and the prior services provided by the firm attorneys, including Mr. Lavender. Estates is an institutional client of Nexsen Pruet and pays the standard rates for services provided by the firm. The hourly rates charged for this litigation are consistent with those charged to Estates for attorneys of comparable experience in other matters handled by Nexsen Pruet.

Additionally, as noted above, Roper Pond offered the affidavit of Karen A. Crawford. Ms. Crawford attests that the fees charged by Nexsen Pruet in this matter are consistent with the range of hourly rates charges by lawyers in this market. Specifically, Ms. Crawford attests:

Based on my experience in litigating challenges to authorizations and permits issued by SCDHEC, my experience working with Mr. Lavender and Ms. Hartley

on various matters over the years having provided an understanding of their capabilities in such matter, and my knowledge of the legal market in South Carolina, the fees charged by Nexsen Pruet, LLC in this contested case and appeal are within the range of hourly rates charged by other lawyers with comparable experience for matters of this nature.

(Exhibit B, Affidavit of Karen A. Crawford). Ms. Crawford further attests that her “current hourly rate on matters of this nature is at least \$485 per hour.” *Id.* Ms. Crawford’s rate is more than that of Mr. Lavender even though he has practiced law five years longer than she.

The Town provided the fees charged by its counsel in this matter, which ranged from \$110 to \$150 per hour. However, counsel for the Town also stated that South Carolina Environmental Law Project is a 501(c)(3) non-profit organization which is funded by donations and grants. Therefore, the rates charged by counsel for the Town provide no meaningful information on the customary legal fees charged by a for-profit law firm. Given the nature and difficulty of the issues raised by Petitioners in this matter, the hourly rates billed by Nexsen Pruet are reasonable.

Applying the factors set forth at Section 15-77-300(B), Roper Pond is entitled to an award of attorneys’ fees in amount of \$195,068, the amount billed by Nexsen Pruet at its standard hourly rate for the time expended in this matter. Roper Pond is further entitled to costs in the amount of \$10,215.84, the amount billed by Nexsen Pruet for costs in this matter.

II. THE DETERMINATION OF AMOUNT OF SANCTIONS.

In the March 15, 2017 Amended Order Vacating Order on Respondent’s Petition for Attorneys’ Fees and Costs and for Sanctions dated September 1, 2016, this Court found that sanctions were proper. Additionally, in the Order issued March 24, 2017, this Court held that the determination of the amount of sanctions will be made in accordance with SCALC Rule 72, which provides that “the judge may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require.” (March 24, 2017 Order, p. 6). The Court further held: “The objective of discouraging like conduct in the future is appropriately achieved by imposing a Rule 72 sanction against the Town. Otherwise, the Town has achieved its stated and improper objective of delaying the Proposed Project by preventing the commencement of construction for not less than thirteen months.” (March 15, 2015 Order, pp. 37-38).

Roper Pond argues that a substantial award is warranted to discourage like conduct in the future. In support of that argument, Roper Pond provided a copy of the Town’s Basic Financial

Statements and Supplementary Information for the year ending December 31, 2014 ("2014 Financial Statement"). (Exhibit 1, Affidavit of Joan W. Hartley dated April 3, 2017). While this was the only Financial Statement available on the Town's website, Roper Pond also provided the October 6, 2016 Council Meeting Minutes which included information on Town Council's review of the 2015 financials and stated that "Mayor Hugley said there had been three exceptional good years in terms of surplus." (Exhibit 2, Affidavit of Joan W. Hartley dated April 3, 2017). The 2014 Financial Statement indicates that the Town has an unrestricted net assets in the amount of \$1,059,203 and \$1,093,433 in "Cash and Cash Equivalents." (2014 Financial Statement, pp. 7 and 9). Additionally, the 2014 Financial Statement identifies Roper Pond's Third Amended Petition in this case as a contingent liability, concluding that "[t]he amount of costs or damages, if any, that may result from the settlement of this case, cannot presently be determined." (2014 Financial Statement, p. 20). Roper Pond argues that the amount of sanctions to be ordered should be determined based on the fact that the Town has more than \$1 million in unrestricted liquid assets.

The Town argues that only nominal sanctions are warranted because the Town has a small population of approximately 900 citizens and a substantial award of sanction would have a debilitating impact on the Town. The Town rents a small space for Town Hall and has one part-time employee who serves as both the Town clerk and treasure. The Town also has a part-time bookkeeper, but no other employees and no municipal department. The reserves established by the Town are to be used for emergencies and capital projects, including a planned construction of a Town Hall. The Town argues that a significant sanction would come from this reserve which would have a debilitating impact of the Town's ability to address its residents and the surrounding community's needs and to carry out planned improvements.

The Town acknowledges that its citizens do not pay taxes to the Town. The Town's sources of revenue are sales tax, insurance tax, brokers tax, telecommunications tax, local business license tax, South Carolina Local Government Fund, and utility franchise fees. Therefore, any sanctions ordered would not be paid by the citizens of the Town. Moreover, the sanctions will not affect the services provided by the Town to its citizen. The only traditional municipal service which the Town provides its citizens is municipal solid waste collection and disposal at no charge. In 2016, the Town's revenue totaled \$320,046 and it expended \$128,562

on the waste services provided to its citizen. Accordingly, any sanctions ordered against the Town will not impact the services provided to its citizens.

In some cases a severe sanction may be justified even though the dollar value in issue may be small. Conversely, in other cases a mild sanction may be indicated even though the amount in issue is large.

In this case involving the construction by a lawful owner of a multiunit housing complex, we have not only a significant value involved but also an egregious use of lawful statutes to the harm of the owner and the unnecessary expenditure of the time of the Court.

The sanctions to be imposed must be of significant strength for the "discouragement of like conduct in the future." I find that given the evidence in the record as a whole, including the financial standing of the Town, that a sanction of Two Hundred Thousand Dollars (\$200,000.00) is proper. *Cf. Gamble v. Stevenson*, 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991) (A wrongdoers ability to pay is a factor to consider in assessing damages). The sanction shall be payable to the Clerk of the ALC.

ORDER

IT IS HEREBY ORDERED that Roper Pond is awarded attorneys' fees and costs under S.C. CODE ANN. § 15-77-300 in the amount of \$205,283.84 payable by the Town to the Clerk of this Court on or before August 15, 2017, to be disbursed by the Clerk to Roper Pond, LLC.

IT IS FURTHER ORDERED that Petitioner Town of Arcadia Lakes is sanctioned, pursuant to SCALC Rule 72, in the amount of \$200,000.00 to be paid to the Clerk of this Court on or before August 15, 2017.

AND IT IS SO ORDERED.


John D. McLeod
Administrative Law Judge

June 14, 2017
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Anthony R. Goldman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency^s Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

June 14, 2017
Columbia, S.C.


Anthony R. Goldman
Judicial Law Clerk

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW JUDGE DIVISION**

Town of Arcadia Lakes, Robert L. Jackson,
Linda Z. Jackson, Robert E. Williams, Barbara
S. Williams, Elizabeth M. Walker, Louis E.
Spradlin, Mary Helen Spradlin, Thomas Hutto
Utsey, Tony Sinclair, Aaron Small, Bette
Small, Gene F. Starr, M.D., Elaine J. Starr,
Sanford T. Marcus, Ruth L. Marcus, and
Steven Brown,

Petitioners,

vs.

South Carolina Department of Health and
Environmental Control and Roper Pond, LLC,

Respondents.

Docket No. 09-ALC-07-0069-CC

ORDER

This matter comes before the South Carolina Administrative Law Court ("ALC" or "Court") on Town of Arcadia Lakes' Amended Motion to Strike or, Alternatively, to Allow Discovery ("Town's Motion"). Petitioner Town of Arcadia Lakes ("Town") moves to strike the following affidavits filed as exhibits to Respondent Roper Pond, LLC's Third Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCR PALC ("Roper Pond's Third Amended Petition") filed on November 30, 2015:

- Exhibit A: Affidavit of Joan W. Hartley dated May 28, 2015 ("First Hartley Affidavit");
- Exhibit B: Amended Affidavit of Joan W. Hartley dated July 16, 2015 ("Second Hartley Affidavit");
- Exhibit C: Amended Affidavit of Charles C. Mickel dated July 17, 2015 ("Mickel Affidavit");
- Exhibit D: Affidavit of Matthew H. Mundy dated April 19, 2010 ("Mundy Affidavit").

In the alternative, if the affidavits are not stricken, the Town moves the Court to conduct additional discovery. On March 3, 2017, Respondent Roper Pond, LLC ("Roper Pond") filed a

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SC ADMIN. LAW COURT

response to the Town's Motion. In its response, Roper Pond withdrew the Mundy Affidavit. A hearing on the Town's Motion was held by telephone conference on March 10, 2017. For the reasons set forth below, the Court denies the Town's Motion as to First Hartley Affidavit and the Second Hartley, grants the Town's Motion as to the Mickel Affidavit, and withdraws the Mundy Affidavit. The Court also denies the Town's request to conduct additional discovery.

BACKGROUND

On April 19, 2010, Roper Pond filed a Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPA LC, following this Court's ruling in favor of Respondents in this contested case. Roper Pond seeks an award of attorneys' fees and costs from Petitioner Town of Arcadia Lakes ("Town") pursuant to S.C. CODE ANN. § 15-77-300, which provides, *inter alia*, that fees will be awarded against a political subdivision of the State in a civil action when the political subdivision acted without substantial justification in pressing its claims. Roper Pond also seeks sanctions against the Town pursuant to Rule 72, SCRPA LC. On April 20, 2010, Petitioners filed and served a Notice of Appeal of the Court's decision. On May 11, 2010, the Court issued an order holding the Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPA LC, in abeyance pending the resolution of Petitioners' appeal.

On April 28, 2015, the South Carolina Supreme Court remitted the matter to this Court. On May 25, 2015, Roper Pond filed its Second Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPA LC. On June 24, 2015, Petitioners filed Petitioners' Motion to Strike or, Alternatively, to Allow Discovery ("Town's First Motion to Strike"). On July 16, 2015, Roper Pond filed Respondent Roper Pond, LLC's Response in Opposition to Petitioners' Motion to Strike or, Alternatively, to Allow Discovery, which included amended affidavits to address issues raised in the Town's First Motion to Strike. By order dated August 3, 2015, the issues for determination on Roper Pond's Petition were bifurcated with the first phase to determine whether Roper Pond is entitled to fees and costs under S.C. CODE ANN. § 15-77-300 and sanctions under Rule 72, SCRPA LC, and the second phase to determine the amount of any award of fees and costs and/or sanctions granted in the first phase. The August 3, 2015 Order states that "Counsel for Petitioners informed the Court as well that if the request is granted it would withdraw the motion strike with express right to re-file that motion should the Court determine that any liability exists." The Court thus "ORDERED that Petitioners may

withdraw the motion to strike without prejudice with leave to re-file.” On November 30, 2015, Roper Pond filed its Third Amended Petition which included the previously filed affidavits.

On May 9, 2016, a hearing on Roper Pond’s Third Amended Petition was held. On June 20, 2016, the Town and Roper Pond filed proposed orders on the first phase of the ruling on Roper Pond’s Third Amended Petition. On September 1, 2016, this Court issued an Order on Respondent’s Petition for Attorneys’ Fees and Costs and for Sanctions. By Order filed on March 15, 2017, the Court vacated the September 1, 2016 Order and re-issued the ruling on Roper Pond’s Third Amended Petition. Both the vacated September 1, 2016 Order and the March 15, 2017 Order found that Roper Pond was entitled to attorneys’ fees and costs pursuant to S.C. CODE ANN. § 15-77-300 and sanctions pursuant to Rule 72, SCRPA LC.

DISCUSSION

I. First Hartley Affidavit

The Town objects to the First Hartley Affidavit on the basis that the documents attached thereto were not admitted into evidence during the hearing on the merits in this case. (Motion, p. 3). Pursuant to S.C. CODE ANN. § 15-77-310, a petition for attorney’s fees under Section 15-77-300 is filed “within thirty days following final disposition of the case.” S.C. CODE ANN. § 15-77-310. A petition for fees under S.C. CODE ANN. § 15-77-300 is a post-trial motion and may be filed following an appeal of the trial court’s decision. *Brackenbrook North Charleston, LP v. County of Charleston*, 366 S.C. 503, 623 S.E.2d 91 (2005) (holding that the 30 days for filing under 15-77-300 runs from the filing of the remittitur by the trial court); *McDowell v. South Carolina Dept. of Social Services*, 300 S.C. 24, 386 S.E.2d 280 (Ct. App. 1989) (same). “[P]ost trial motions may be heard on affidavits.” *Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 122, 441 S.E.2d 835, 838 (Ct. App. 1994) (citing *Santee Portland Cement Corp. v. Mid-State Redi-Mix Concrete Co., Inc.*, 273 S.C. 784, 260 S.E.2d 178 (1979) (upholding trial court consideration of affidavits of attorneys offered in support of Rule 60(b)(5) motion); *Gaskins v. California Insurance Co.*, 195 S.C. 376, 11 S.E.2d 436 (1940) (upholding trial court’s consideration of affidavits in support of a motion for relief from default judgment). Roper Pond’s Third Amended Petition is a post-trial motion, and affidavits are admissible in support of that post-trial motion.

The Town cites to the Fourth Circuit ruling in *Spivey v. U.S.*, 912 F.2d 80 (4th Cir. 1990) which found that an affidavit of counsel is inadmissible hearsay. However, in that case, the Fourth Circuit ruled that the affidavit was inadmissible hearsay because it offered substantive evidence on the plaintiff's physical condition, the timing of the discovery of her condition and her prognosis based on statements of third parties to plaintiff's counsel for which no exception applied. *Id.* at 85. Such is not the case here, the statements in the First Hartley Affidavit provide personal knowledge of the production of the attachments thereto. The documents attached to the First Hartley Affidavit are documents produced pursuant to a subpoena issued as an officer of this Court in this matter, exhibits to a deposition in this matter, and party filings in this matter. Therefore, the holding in *Spivey* is not applicable, and the First Hartley Affidavit and the exhibits thereto are properly offered through the First Hartley Affidavit.

The Town further argues that the First Hartley Affidavit should be stricken because the documents attached thereto contain inadmissible hearsay. As a preliminary matter, the Town failed to timely raise this objection. "The failure to make an objection at the time evidence is offered constitutes a waiver of the right to object." *Cogdill v. Watson*, 289 S.C. 531, 537, 347 S.E.2d 126, 130 (Ct. App. 1986). The August 3, 2015 Order withdrew the Town's June 24, 2015 Motion to Strike "with express right to re-file that motion should the Court determine that any liability exists." On November 30, 2015, Roper Pond filed its Third Amended Petition which included the previously filed affidavits. On May 9, 2016, a hearing on Roper Pond's Third Amended Petition was held. On June 20, 2016, the Town and Roper Pond filed proposed orders on the first phase of the ruling on Roper Pond's Third Amended Petition. Roper Pond's proposed order included excerpts from a number of the documents attached to the First Hartley Affidavit. The Town did not object to these documents at the May 9, 2016 hearing or in response to Roper Pond's proposed order. Having failed to timely object to the admissibility of the documents attached to the First Hartley Affidavit, the Town has waived its right to so object.

However, even if the Town had timely object to the documents attached to the First Hartley Affidavit, the Town's objection on the basis of inadmissible hearsay would not preclude the admissibility of the documents. Exhibits 2 through 14 are emails to and from Richard W. Thomas, Jr., then Mayor of the Town and the Town's 30(b)(6) designee, and other individuals acting on behalf of the Town. Exhibits 15 and 16, which are exhibits to the Town's 30(b)(6) deposition, are an email communication with Mr. Thomas and a resolution of the Town Council.

The statements in these documents are party admissions. S. C. R. Evid. 801(d)(2). Therefore, even if the Town had timely objected, the Town has failed to identify inadmissible hearsay in the documents attached to the First Hartley Affidavit. The motion to strike the First Hartley Affidavit is therefore denied.

II. Second Hartley Affidavit

The Town moves to strike the Second Hartley Affidavit which was offered to demonstrate the amount of attorneys' fees and costs incurred by Roper Pond in this matter. Specifically, the Town argues that the records attached to the Second Hartley Affidavit are either not included in their entirety or not sufficiently detailed to allow the Town to test the validity of the affidavit and records. An affidavit of counsel has been recognized as an appropriate means of offering evidence of attorneys' fees and costs. *See, e.g., Layman v. State*, 658 S.E.2d 320, 336, 376 S.C. 434, 463, fn. 2 (2008) (noting that costs and fees incurred were set forth in affidavits); *Catchings v. South Carolina Dep't of Motor Veh.*, 2008 WL 9841742, at *5 (Ct. App. Jun. 9, 2008) (noting that counsel presented affidavit for fees under Section 15-7-300); Rule 55(b)(3) (requiring only an affidavit of the attorney for fees for a default judgment). The affiant is an officer of the Court. The Affidavit is based on personal knowledge of matters to which she is competent to testify. The Affidavit includes a list of daily individual time entries for the attorneys litigating this matter.¹ The Second Hartley Affidavit is sufficiently detailed to allow the Court to determine the time devoted to this matter as required by S.C. Code Ann. § 15-77-300. The Town's motion to strike the Second Hartley Affidavit is therefore denied.

III. Mickel Affidavit

The Town moves to strike the Mickel Affidavit on the basis that the affidavit and attached exhibits are insufficient evidence of the costs of delay incurred by Roper Pond due to the Town's filing of this contested case. The Mickel Affidavit is offered by Roper Pond in support of its petition for sanction under Rule 72, SCRALC, as evidence that the contested case resulted in increased costs for the project which was the subject of this contested case. The March 15, 2017 Order vacated the September 1, 2016 Order and re-issued the ruling on Roper Pond's Third

¹ The total of fees incurred on the list of individual time entries exceeds the total of fees charged on this matter because certain time entries were discounted on the bill to Roper Pond.

Amended Petition to clarify that the type and amount of sanctions are in the discretion of the Court. Rule 72 provides that "the judge may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require." Rule 72, SCRPA LC. Therefore, the Mickel Affidavit has no relevance to the determination of the type and amount of sanction to discourage the Town from like conduct in the future. The Town's motion to strike the Mickel Affidavit is therefore granted.

IV. Request for Additional Discovery

The Town argues that it is entitled to conduct additional discovery on the evidence offered in the affidavits. As discussed in Section I above, a petition for attorneys' fees under S.C. CODE ANN. § 15-77-300 is a post-trial motion. "[P]ost trial motions may be heard on affidavits." *Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 122, 441 S.E.2d 835, 838 (Ct. App. 1994) (citing *Santee Portland Cement Corp. v. Mid-State Redi-Mix Concrete Co., Inc.*, 273 S.C. 784, 260 S.E.2d 178 (1979) (upholding trial court consideration of affidavits of attorneys offered in support of Rule 60(b)(5) motion); *Gaskins v. California Insurance Co.*, 195 S.C. 376, 11 S.E.2d 436 (1940) (upholding trial court's consideration of affidavits in support of a motion for relief from default judgment). Additionally, courts routinely decide petitions under S.C. CODE ANN. § 15-77-300 and other fee-shifting statutes on affidavits. *See, e.g., Layman v. State*, 658 S.E.2d 320, 336, 376 S.C. 434, 463, fn. 2 (2008) (noting that costs and fees incurred were set forth in affidavits); *Catchings v. South Carolina Dep't of Motor Veh.*, 2008 WL 9841742, at *5 (Ct. App. Jun. 9, 2008) (noting that counsel presented affidavit for fees under Section 15-7-300); *South Carolina Dep't of Transp. v. Revels*, 766 S.E.2d 700, 707, 411 S.C. 1, 15 (2014) (noting that affidavit of counsel to be submitted in support of petition for attorneys' fees); *Hunkler v. Frey*, 2012 WL 10862808, at *3, fn. 2 (Ct. App. Oct. 3, 2012) (noting that award of attorneys' fees was based on counsel's affidavit). *Haley Nursery Co., Inc. v. Forrest*, 381 S.E.2d 906, 909, 298 S.C. 520, 524 (1989) (same). Similarly, there is no such basis for discovery in connection with the motion for sanctions under Rule 72, SCRPA LC. The request for additional discovery is therefore denied.

ORDER

IT IS HEREBY ORDERED that the Town's motion to strike the First Hartley Affidavit and the Second Hartley Affidavit is denied.

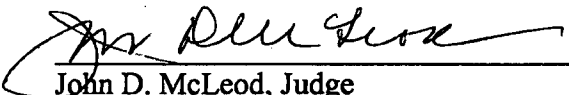
IT IS FURTHER ORDERED that the Town's motion to strike the Mickel Affidavit is granted.

IT IS FURTHER ORDERED that the Mundy Affidavit is withdrawn.

IT IS FURTHER ORDERED that the Town's request to conduct additional discovery is denied.

AND IT IS SO ORDERED.

March 24, 2017
Columbia, SC



John D. McLeod, Judge
South Carolina Administrative Law Court

CERTIFICATE OF SERVICE

I, Anthony R. Goldman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

March 24, 2017
Columbia, S.C.


Anthony R. Goldman
Judicial Law Clerk

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Town of Arcadia Lakes, Robert L. Jackson,
Linda Z. Jackson, Robert E. Williams, Barbara
S. Williams, Elizabeth M. Walker, Louis E.
Spradlin, Mary Helen Spradlin, Thomas Hutto
Utsey, Tony Sinclair, Aaron Small, Bette
Small, Gene F. Starr, M.D., Elaine J. Starr,
Sanford T. Marcus, Ruth L. Marcus, and
Steven Brown,

Petitioners,

vs.

South Carolina Department of Health and
Environmental Control and Roper Pond, LLC,

Respondents.

Docket No. 09-ALC-07-0069-CC

**AMENDED ORDER VACATING
ORDER ON RESPONDENTS'
PETITION FOR ATTORNEYS' FEES
AND COSTS AND FOR SANCTIONS
DATED SEPTEMBER 1, 2016**

This matter comes before the South Carolina Administrative Law Court ("ALC" or "Court") on the Third Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to SCALC Rule 72 ("Petition") filed by Respondent Roper Pond, LLC ("Roper Pond") on November 30, 2015. Roper Pond seeks an award of attorneys' fees and costs from Petitioner Town of Arcadia Lakes ("Town") pursuant to S.C. CODE ANN. § 15-77-300, which provides, *inter alia*, that fees will be awarded against a political subdivision of the State in a civil action when the political subdivision acted without substantial justification in pressing its claims. Roper Pond also seeks sanctions against the Town pursuant to SCALC Rule 72, in the form of an award of attorneys' fees and costs and the cost of delay of Roper Pond's proposed development. By order dated August 3, 2015, the issues for determination on Roper Pond's Petition were bifurcated with the first phase to determine whether Roper Pond is entitled to fees and costs under S.C. CODE ANN. § 15-77-300 and sanctions under SCALC Rule 72, and the second phase to determine the amount of any award of fees and costs and/or sanctions granted in the first phase. The Town filed its Amended Response to Respondent Roper Pond, LLC's Third Amended Petition for Fees, Costs, and Sanctions on February 5, 2016, and Roper Pond filed a reply on February 16, 2016. The Court heard arguments on the first phase determinations on Roper Pond's

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Petition on May 9, 2016. For the reasons set forth below, the Court finds that Roper Pond is entitled to an award of attorneys' fees and costs under S.C. CODE ANN. § 15-77-300. Sanctions against the Town pursuant to SCALC Rule 72 are also proper.

PROCEDURAL HISTORY

By letter dated December 15, 2008, Respondent South Carolina Department of Health and Environmental Control ("Department" or "DHEC") granted Roper Pond coverage under the 2006 NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities ("Construction General Permit"), authorizing land-disturbing activities on 9.6 acres in association with construction of a multi-family residential housing development to be located off Trenholm Road in Richland County ("Proposed Project"). On December 30, 2009, Petitioners the Town, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown (collectively, the "Petitioners") requested that the South Carolina Board of Health and Environmental Control ("Board") review the issuance of the authorization to discharge under the Construction General Permit. By letter dated January 14, 2009, the Clerk of the Board notified Petitioners that the Board had decided not to conduct a review conference as requested. On February 16, 2009, Petitioners filed a Request for Contested Case Hearing, asserting numerous grounds for its appeal of the Department's decision in this matter. At the hearing on the merits, Petitioners' case-in-chief focused almost exclusively on the potential biological impacts of the excavation and lowering of the Pond and allegations that Roper Pond did not have a valid federal permit for the Proposed Project. On January 21, 2010, this Court issued an order finding that the Petitioners lacked standing, but ruling on the merits of the case. The order affirmed the Department's decision to authorize coverage under the Construction General Permit and rejected Petitioners' arguments that Roper Pond failed to obtain the necessary U.S. Army Corps of Engineers' permits and DHEC 401 water quality certification for the Proposed Project.

On February 1, 2010, Petitioners filed a Motion to Reconsider and for Stay. On March 23, 2010, the Court held a hearing to consider Petitioners' Motion to Reconsider and for Stay, and on April 1, 2010, the Court issued an order denying Petitioners' Motion to Reconsider and for Stay. On April 19, 2010, Roper Pond filed a Petition for Attorneys' Fees and Costs and for Sanctions

Pursuant to SCALC Rule 72. On April 20, 2010, Petitioners filed and served a Notice of Appeal of the Court's decision. On May 11, 2010, the Court issued an order holding the Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to SCALC Rule 72, in abeyance pending the resolution of Petitioners' appeal. On March 6, 2013, the Court of Appeals issued a decision upholding this Court's ruling on standing and the merits of the case. On June 12, 2013, the Court of Appeals withdrew its March 6, 2013 Opinion and substituted a new Opinion, again affirming this Court's Final Order and Decision on standing and the merits of the case.

On July 12, 2013, Petitioners filed a petition for writ of certiorari with the Supreme Court. The Supreme Court granted the writ on August 22, 2014. On March 18, 2015, the Supreme Court heard oral arguments. By order dated April 9, 2015, the Supreme Court dismissed the writ of certiorari as moot. The Order stated that "construction activities subject to and authorized by the state-wide general permit have been completed, Roper's coverage under the state-wide general permit has now terminated." The Supreme Court therefore dismissed the matter as moot "as it is now impossible for this Court to grant any redress in the context of the issues as framed and litigated below (i.e., modify or revoke authorization for Roper's construction activities under the state-wide permit)." On May 13, 2015, Roper Pond filed a motion for costs pursuant to Rule 222, SCACR. On June 17, 2015, the Supreme Court issued an order which provided in its entirety: "The Motion for Costs filed on behalf of respondent, Roper Pond, LLC, in the above entitled matter is denied."

FACTUAL BACKGROUND

On September 24, 2008, Roper Pond filed a notice of intent to discharge stormwater associated with the construction of the Proposed Project under the Construction General Permit. A storm water pollution prevention plan ("SWPPP") was submitted with the notice of intent as required by the General Permit and S.C. CODE ANN. REGS. §§ 72-300 *et seq.* ("Stormwater Regulations"). Roper Pond submitted the notice of intent and SWPPP to Richland County for review of the Stormwater Regulations. However, prior to the conclusion of Richland County's review, DHEC requested transfer of the review to the Department because of "concerns that had been raised by citizens about the project." In reviewing a SWPPP, the reviewing entity assesses the proposed Best Management Practices ("BMPs") to determine whether those measures are adequate to meet the requirements of the Stormwater Regulations and of the General Permit. With respect to any potential deficiencies in the SWPPP or the BMPs detailed in the SWPPP, Jill

Stewart, a licensed professional engineer in South Carolina and Manager of the DHEC'S Stormwater Permitting Section, testified the SWPPP for any proposed project can be revised as needed to incorporate the appropriate combination of BMPs and implementation procedures necessary to meet the requirements of the General Permit.

During DHEC's review of Roper Pond's request for coverage under the Construction General Permit, citizens of the Town were provided the opportunity to comment on Roper Pond's SWPPP, including meetings with DHEC and other governmental representatives to discuss concerns regarding the Proposed Project. The Town was involved in communications with DHEC and other governmental representatives regarding the Proposed Project. Brian Bates and Daniel Hill, both professional engineers and residents of the Town, assisted the Town in its review of the SWPPP and its opposition to the Proposed Project. In an October 2, 2008 email, Richard Thomas, Mayor of the Town, advised Mr. Bates as follows:

Thank you again . . . wish us luck Monday . . . Joel has received a copy of a letter DEHEC sent to the developer telling him that they had pulled the developer's application and want him to provide all documentation for additional review. Is the first flush requirements a possible application killer that would require them to reapply. If we could get to that point, we may have [a] chance to get them under the new rules if they approved before they have a chance to reapply. . . RT

On October 3, 2008, Mr. Hill emailed Mr. Thomas a summary of concerns identified in his review of Roper Pond's SWPPP. The concerns raised by the Town's consultants were addressed in DHEC's letter to Roper Pond following the Department's review of the SWPPP. In an October 29, 2008 email, Mr. Thomas forwarded the Department's review letter for the SWPPP to Mr. Bates and requested that Mr. Bates advise him "if we in Arcadia Lakes need to ask for more." Mr. Bates advised Mr. Thomas as follows:

Told you that "waters of the state for water quality" thing had teeth. They now have to show how they are going to collect, and hold for 24 hours, the first inch of runoff from the entire site, which will be approximately 36,000 cubic feet or 271,000 gallons. For visualization purposes, that would be a pond (like the one that was built for those 4 or 5 lots down Trenholm Road) that would be 3-ft. deep and 110-ft. X 110-ft. square or about the volume of the Rockbridge Club swimming pool. To account for that outside of the wetlands boundary, they are going to have to significantly revise the site plans.

I suggest we wait until they try to address this and then bring up the interpretation that this water must be segregated from all of the other runoff. To do that on dense site is an impractical endeavor at best and not

usually required due to its complexity. However, a strict interpretation of the regulations indicates that it is required. (emphasis added).

Mr. Thomas responded: "Thanks again for your continued expertise in this matter." Although DHEC was addressing the technical issues raised by the Town, Mr. Bates advised the Town to withhold comments on other potential issues regarding the regulatory sufficiency of the SWPPP.

The Town adhered to this advice when Roper Pond's consultant revised the SWPPP to address the issues raised in DHEC's review letter. In a November 6, 2008 email, Mr. Thomas requested that Mr. Bates and Mr. Hill attend a meeting with DHEC in Senator Joel Lourie's office to "review the revised set of BP Barber plans for the Roper Property." Mr. Bates advised Mr. Thomas as follows:

Yes I can attend a meeting at that time. As for your phone message about BP Barber, I don't care if they are there, but letting them know our position on their design (assuming we find flaws) that quickly will just expedite their response. I would think that every day that this thing is not resolved is another day it isn't being built. Going through the system is a more formal, civil, and slower method in my opinion. I would rather them keep guessing what our next move is instead of confronting them. Just my thoughts.

Upon receipt of the following email message, Mr. Thomas responded: "I agree with you . . . I will let Joel know that You Danny and I can be there." (ellipses in original). Mr. Thomas thereafter forwarded the email to Senator Lourie, advocating Mr. Bates' recommendation to exclude B.P. Barber and Roper Pond from the meeting. There is nothing in the record to indicate that the Town submitted further comments on the revised SWPPP following the November 14, 2008 meeting with DHEC and Senator Lourie.

The Department issued its decision to grant coverage to Roper Pond on December 15, 2008. On December 17, 2008, Mr. Thomas sent an email to Brian Bates regarding the appeal of the Department's decision. Mr. Thomas wrote:

We have until December 30 (15 days) to file an appeal to the DEHEC Board. We need to review the approval and the revised plans to determine if we have a reason or cause to appeal to the Board, **and if not, can we still send in a blanket appeal to the DEHEC Board and delay the actual decision for 60 days.** We need to get our hands on the plans. (emphasis added).

Mr. Thomas thus acknowledges that the Town had not reviewed the final SWPPP approved by DHEC for the Proposed Project. Still, without reviewing the final SWPPP, the Town determined that it should file an appeal of the DHEC decision. At the close of the December 17, 2008 email,

Mr. Thomas wrote: "Let me know where you think we can go to delay and/or stop this project." (emphasis added).

On December 30, 2008, the deadline for filing for Board review, Petitioner Linda Jackson forwarded a draft appeal letter to Mr. Thomas. The draft letter raised a number of issues regarding the planned development of the property, but did not identify a single defect in the Department's grant of coverage under the Construction General Permit. The draft letter included the following claims:

Mr. Mundy, who signed the Notice of Intent for this project, has claimed for months that he is not the current owner of the land upon which the project is to be built. The current owner of record is Roper Pond, LLC of which Mr. Mundy was a member. According to Mr. Mundy, Roper Pond, LLC was sold to Capital Development, LLC in January of 2008, however, there is no deed of record to reflect a transfer of interest in the referenced real property. From what we know, the only member of Capital Development, LLC is Charles Mikel who lives in Greenville. This information may or may not have any impact on the decision to issue the stormwater permit, but we believe that the Board need to be informed about who is truly responsible in this situation.

What is significant in this matter is that Mr. Mundy came to the Arcadia Lakes community in May of 2004 with a plan for the subject property to be developed with high end, single-family patio homes with a transition-type design which moved from patio homes to multi-family condominium units, along with a clubhouse and other recreational areas. The original plan for the property was based on a density of approximately four (4) units per acre. The new plan for development of the property presented in early August of this year by Mr. Mundy has no provision for a transition, and in fact has total of eight (8) multi-family apartment buildings with an overall density of approximately sixteen (16) units per acre. We feel that this drastic change in the plans for the property was misleading to adjacent property owners and the local neighborhood in general. Had we not been presented a plan four years ago that was basically satisfactory to the neighborhood, we never would have allowed the County rezoning process to move forward unchallenged. Essentially, the community was duped.

Although the Petitioners filed a different letter requesting Board review, this earlier draft by Ms. Jackson summarizes the actual concerns regarding the Proposed Project, none of which relate to the approval of the SWPPP and coverage under the Construction General Permit.

Prior to filing the request for a contested case hearing, counsel for Petitioners conferred with Gene McCall, an environmental consultant and attorney, regarding potential bases for challenging DHEC's decision to grant Roper Pond coverage under the Construction General Permit. Mr. McCall withdrew from the case because of a conflict but offered to "get with Brian

Bates and we will come up with several names of potential engineering expert witnesses." In their request for a contested case hearing, Petitioners identified the following alleged defects in the SWPPP:

A. Upon information and belief, Roper Pond, LLC, submitted incorrect and incomplete information to DHEC. Roper Pond, LLC's Stormwater Pollution Prevention Plan (SWPPP) is deficient and DHEC should not have issued a Construction NPDES Permit for this site:

(1) There are significant defects in the construction and post construction portions of Roper's SWPPP. The silt fence show on drawing C2 is placed inside the Wetlands Buffer, too close to the wetlands, and in some areas through the wetlands. The Wetlands Buffer area must remain undisturbed to be effective.

(2) The September 2, 2008 Richland County conditional approval states that the maximum driveway width be 24 feet. The Roper drawing C4 shows a 26 foot width. This adds significant impervious area which would cause additional stormwater runoff and additional pollutants. The County conditional approval requires "Preservation of trees in the green area next to the pond." Based on the existing condition shown on drawing C1 and the Site Planting Plan, it appears that no trees are being preserved in the green area around the pond. Grubbing existing trees in the area around the pond defeats the usefulness of a Wetlands Buffer and will cause sediment to enter the pond.

(3) Roper Pond, LLC's documents note that zinc is a problem in Cary Lake, but incorrectly states that no zinc will come from its development. It is well documented that zinc is discharged from roof drains or large buildings and from large parking lot areas.

(4) DHEC is not authorized to issue an NPDES Construction Permit where such construction or post construction condition would "cause or contribute" to impairment of the receiving water body, unless, the MS4 is in compliance with its Stormwater Management Plan (SWMP). On its website, Richland County states, "Q. Why is Richland County proposing new stormwater regulations, to include buffers? A. Because Richland County is in violation of the clean water act and has been cited by DHEC . . . And as a result of this violation, we have agreed to change our regulations to address the cited deficiencies. These changes would help Richland County improve the water quality in our community for our residents." Therefore DHEC cannot issue a new construction permit until the County adopts and applies the improved ordinance.

(5) Roper Pond, LLC's calculated trapping efficiency for the post construction water quality devices (i.e., Best Management Practices (BMPs)) is flawed. First, the calculations do not properly and adequately address capture of the "first flush" stormwater runoff volume that would come from the site; and thus, the devices are not of adequate size to

capture what is documented to be the most significant portion of a runoff event for transporting pollutants to the receiving water. Second, Roper Pond, LLC, assumes an even distribution of particles, 20% for each of the five particle sizes. This assumed particle distribution is incorrect and yields an inaccurate and incorrect particle trapping efficiency for these BMPs. Also, no oil and grease trapping efficiency was calculated. Leaking vehicle crankcase and transmission oils in parking lots would contain and transport zinc if not properly captured. DHEC should not have approved the Construction NPDES Permit because of these significant deficiencies.

Despite the alleged deficiencies raised by the Town prior to DHEC's December 15, 2008 approval of Roper Pond's SWPPP and the alleged deficiencies asserted in Petitioners' Request for Contested Case Hearing, and contrary to the recommendation of Mr. McCall, Petitioners failed to offer an engineering expert witness to testify at the hearing on the merits. Moreover, Petitioners failed to present any evidence at the hearing on the merits in support of its allegations that the SWPPP and the BMPs proposed in the SWPPP were not sufficient to meet the regulatory requirements. *Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control and Roper Pond, LLC*, ALC Docket No. 09-ALJ-07-0069-CC, 2010 WL 6782535, (Jan. 21, 2010). Petitioners' only expert witness admitted that he did not review the General Permit, the SWPPP, or the BMPs to be implemented under the SWPPP and admitted that he was not able to offer an opinion regarding the sufficiency of such measures. The Town's claims regarding the sufficiency of Roper Pond's SWPPP and the BMPs proposed in the SWPPP were therefore abandoned as a basis for challenging the Proposed Project.

During the 30(b)(6) deposition of the Town, Mr. Thomas, the Town's mayor and designated deponent, failed to identify a factual basis for challenging the sufficiency of the SWPPP. On July 29, 2009, Roper Pond noticed the deposition of the Town pursuant to Rule 30(b)(6), SCRCP. The notice of deposition included the following matters on which the Town was to designate an individual to testify:

2. Actual or threatened harm from the activities authorized under the 2006 NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities ("General Permit") for land-disturbing activities on 9.6 acres in association with construction of a multi-family residential housing development to be located off Trenholm Road in Richland County ("Proposed Project").

* * *

4. The specific manner in which the land-disturbing activities authorized under the General Permit will violate the terms and conditions of the General Permit and/or DHEC Regulations.

The Town designated Mr. Thomas as its sole witness for the Rule 30(b)(6) deposition of the Town. Mr. Thomas holds a master's degree in engineering with a focus on structures of mechanics and environmental engineering. As an engineer licensed by the State, Mr. Thomas has affixed his seal to drawings which include the design of water retention structures. Mr. Thomas is aware of the requirements for the management of stormwater at an improved site. Mr. Thomas testified that he has seen the design drawings for the Proposed Project. Mr. Thomas testified that he would be competent to prepare and seal such drawings. However, Mr. Thomas was unable to testify regarding the topics identified by Roper Pond in its notice of deposition to the Town.

When counsel for Roper Pond asked Mr. Thomas to identify any alleged deficiencies in the SWPPP approved by the Department for the Proposed Project, Mr. Thomas responded that any deficiencies were identified by its attorney in the pleadings in this matter:

Q: All right. Let's talk about that. Tell me—well, let me back up. The current plan.

Tell me what in the current plan you think presents a possibility or probability of harm to Cary Lake.

A: I outlined those before. It will possibly do harm to the water flowing through the project and under North Trenholm Road into Cary Lake.

Q: What is the deficiency in the BP Barber drawings that may lead to the possibility?

A: They're outlined in our petition.

Q: Point them out to me.

A: You want me to read you the document?

Q: No, sir. I want to know what the town's —

A: I'll defer that to Mr. Chandler because he's the legal expert.

Q: He is not my witness, Mr. Thomas. You are my witness and you are the town.

Tell me what facts the town has as we sit here today that allows you to opine that there's a possibility of harm if the BP Barber plan is implemented.

A: Based on what we have been told and led to believe by Mr. Chandler, who is the expert in the legal side of this, there are violations in this plan with regard to the project. The plans and its permitting with DHEC and the U.S. Corp of Engineers.

Q: I want you to step aside and put aside anything Mr. Chandler may have told you. In the absence of Mr. Chandler's comments, is the town aware of any fact upon which it could base an opinion that there is a deficiency in the BP Barber drawings permitted by DHEC?

A: We have hired Mr. Chandler as our spokesman on the legal issues in this case. We believe the case has merit.

Q: Step aside what Mr. Chandler tells you—if Mr. Chandler becomes a witness, we'll deal with this case differently.

What information does the Town of Arcadia Lakes have that, outside of Mr. Chandler's comments to you, leads you to the conclusion that there are deficiencies in the BP Barber design approved by DHEC?

A: We lean on Mr. Chandler's filings and his documentation as the basis for our—

Q: Is Mr. Chandler's complaint the sole source of facts, for the Town of Arcadia Lakes, for it to present a position that the BP Barber drawings are in some way insufficient?

A: I can repeat. Mr. Chandler's pleadings and his filings speak to the case that the town and the petitioners—not speaking for them, but as far as the town is concerned—where we are in our position on this project.

Mr. Thomas further testified regarding an allegation of a technical deficiency in the SWPPP:

Q: I assume that you are asserting that that's something wrong with the plans?

A: If Mr. Chandler says that's something wrong, then I agree with Mr. Chandler.

Q: What information did Mr. Chandler rely upon to come to that conclusion?

A: You'd have to talk to Mr. Chandler, because I do not know.

Q: Do you know of any witness on behalf of the Town of Arcadia Lakes, outside of Mr. Chandler, who can tell me how that conclusion was arrived at?

A: Not to my knowledge.

Despite Mr. Thomas's education in environmental engineering, his experience in the design of stormwater retention structures, and his familiarity with the SWPPP, he was unable to identify a single factual allegation related to the purported defects in the SWPPP independent of the filings in this matter.

Although the Town did not present evidence of deficiencies in the SWPPP, the Town identified a number of concerns with the Proposed Project unrelated to DHEC's decision to grant Roper Pond coverage under the Construction General Permit. Mr. Thomas testified at length about the Town's numerous concerns and complaints about the planned development of the Roper Pond property as an apartment complex. Mr. Thomas testified that there was no opposition to the previous plan to construct condominiums on the Roper Pond property. Specifically, Mr. Thomas testified regarding a request from Roper Pond to annex the property into the Town and the support for the development of the property as condominiums and patio homes:

Q: All right. Arcadia Lakes has its own zoning ordinance administered by its own zoning board?

A: That's correct.

Q: Why did you not suggest that he make an appeal to your zoning board?

A: It was easier—we thought it was easier for them to do it the other way. I don't remember what the context was then.

Q: Were you concerned that the citizens would oppose that kind of zoning?

A: No. As a matter of fact from the condo standpoint, out of the 15 or 20 small zero lot line patio homes, we had as many as 10 that were spoken for by town's people that wanted to retire and no longer do yard work and still be in the town.

Our town is a very close town. We have almost 900 residents and we are a very, very close [k]nit town. People don't want to move out of the town once they move in.

There are a lot of amenities in the town that are very, very good. For instance, there's no taxes. We don't have any town taxes. We deal off of County taxes, revenue sharing, franchise fees, business licenses. Those type of things. We run the town off of a very lean budget.

Q: So you, for whatever reason, suggested that rather than annexing him in and changing your zoning—

A: We couldn't do that. It was my understanding at that time that that was not an option.

Q: For what reason?

A: If we annexed him in, then he would be annexed in as the existing zoning. And he didn't want the existing zoning, which was residential, light commercial. He wanted multifamily.

Q: So to solve that you suggested he get the County to change it, and then you can bring him in, grandfather him in, or bring him in subject to that zoning?

A: Correct.

Q: And you thought that would work?

A: With the plans that he had then, everyone was very much in favor of those. The plans were very high-end condos, low density, a lot of amenities, and fit in with the -- --

Q: Understanding that we're talking hindsight, but the feeling at the time was that if he had gone forward with that project of patio homes to condominiums, it would have been supported by the town and you could have brought it in, annexed it in, subject to the County zoning?

A: --with the plans that were presented to us at that time, we did not have any major problems with those plans at that time that I can recall.

Q: You would have recommended bringing it into the city by annexation?

A: Correct.

Q: And you had citizens in the town who were in favor of it and who actually wanted to live in the patio homes?

A: That's correct.

The opposition to the development began upon learning that the property would be developed as an apartment project. Mr. Thomas testified:

Q: As of October 2nd, was one of your reasons for opposing this project as mayor of the Town of Arcadia lakes, the potential for individual unit owners to have their property values depressed?

A: Yes. That was one of the reasons we wanted an economic study done to determine that.

Q: Is that one of the reasons you wanted to stop this project?

A: That was one of the reasons for our opposition to the project as it was presented.

Q: And do I understand you to say that as it was presented, the primary concern was the additional density over and above what was presented to you in 2004?

A: No. It was also the economic impact. It was also the character of the neighborhood.

Q: Well, you did not oppose the townhouses, patio homes, condominiums, correct? You personally wanted to buy one.

A: True.

Q: What factor, other than the density of the apartments, led you to believe there would be a depression in economic value for certain homeowners in Arcadia Lakes?

A: Safety to you, to the transient nature of the folks renting the property, light intrusion into the actual property adjoined, potential overflow of the sewer system due to the fact—did it actually—was it sized properly to handle an additional 204 units. I mean, the town only has 890 people living in the town. You're adding another 4-500 residents to the system, traffic. All those had—all those come together—all of that has to do with the density.

Q: All of those factors arise out of the increase density, right?

A: That's the way I see it.

The Town believed that the developers of the Proposed Project had misled the Town to obtain support for the rezoning of the property. For example, in an August 23, 2008 email, Mr. Thomas wrote:

I believe that the town was misled and deceived in the initial meetings 3+ years ago when the same developer came to us for our support and the support of the adjacent neighborhood to rezone and then used the rezoning to restructure his plans for monetary gain. Per conversation with Mr. Carter Ellis, the same was told to the property owners on the north side of the Roper Property to get their blessing for the rezoning. The town should use all necessary means to go before the Richland County Planning Commission and appeal the August 21 Planning Committee recommendation (on numerous reasons of environmental impact, faulty traffic studies and NPDES requirements that have not been studied or met concerning flood control) and to resend [sic] the past zoning change on the grounds of misrepresentation and breach of verbal contract.

In addition to the appeal of DHEC's decision to grant Roper Pond coverage under the Construction General Permit for the Proposed Project, the Town opposed other governmental authorizations for the Proposed Project. For example, Mr. Thomas contacted a politician and others to assist the Town in holding up South Carolina Department of Transportation approval for the Proposed Project. Additionally, at its October 2, 2008 council meeting, the Town adopted a resolution to the Richland County Planning Commission regarding development plans submitted to the County for the Proposed Project. The Resolution advised the Commission of the Town's belief that the proposed development, multifamily high density apartments, was "out of character and totally incongruous for the entire town, its neighborhoods, contiguous community and the intended zoning use as originally presented." The resolution further requested that "an economic impact study be performed to determine the loss of property value to the homes in the adjacent Kaminer Station Subdivision, and homes directly affected across Trenholm Road and by adjacent nearby lakes, due to the proposed 204 apartments . . ."

In affirming this Court's ruling on the Town's lack of standing, the Court of Appeals held:

The ALC found the Town did not satisfy the first element required to establish standing, namely, that it had a personal stake in the litigation. *Quoting Glaze v. Grooms*, 324 S.C. 249, 255, 478 S.E.2d 841, 845 (1996), the ALC referenced the general rule that "a municipality must allege an infringement of its own proprietary interests or statutory rights to establish standing." In response to this statement, Appellants advocate a broad interpretation of the term "proprietary interest" in determining whether the Town has demonstrated an injury in fact sufficient to confer standing. In the present case, Appellants argue "proprietary interests" include: (1) the Town's interest in protecting the environmental quality of Cary Lake, which lies partly within the Town borders; (2) the Town's ability to comply with federal law, such as NPDES regulations; (3) the Town's interest in maintaining its character and desirable attributes, including its aesthetic appeal:

and (4) the diminution of property values within the Town and other adverse effects of a nearby apartment complex on such concerns as security and traffic congestion. We hold that none of these professed interests, whether “proprietary” or not, are sufficient to confer standing on the Town in this case.

As to the first two concerns, Town Mayor Richard Thomas testified in a deposition that the Town had no ownership interest in Cary Lake. Mayor Thomas gave a brief statement that under NPDES regulations, the Town was responsible for water that flowed out of Cary Lake, but provided no supporting authority for this assertion. Moreover, he acknowledged the Town is not responsible for the maintenance of Cary Lake, has never allocated funds for this purpose, and has never incurred any fines under NPDES regulations despite alleged problems in the past with water flowing into Cary Lake. He also stated that Cary Lake is the “bottom lake,” that is, the final lake into which the remaining six lakes flow. We also find significant the absence of any evidence from Appellants that the BMPs to be implemented under the SWPPP were inadequate to prevent sediment from leaving the construction site; thus, Appellants have also failed to show their alleged injuries are “fairly traceable” to the challenged action in this case. Similarly, Appellants authorization of coverage to Roper for land-disturbing activities under the State General Permit and either of their two remaining concerns. Therefore, pursuant to section 1-23-610, we affirm the ALC’s determination that the Town lacks standing.

Town of Arcadia Lakes v. South Carolina Dep’t of Health and Envtl. Control, 404 S.C. 515, 529-31, 745 S.E.2d 385, 393 (Ct. App. 2013). In affirming this Court’s ruling, the Court of Appeals noted the “absence of any evidence from Appellants that the BMPs to be implemented under the SWPPP were inadequate to prevent sediment from leaving the construction site; thus, Appellants have also failed to show their alleged injuries are ‘fairly traceable’ to the challenged action in this case.” *Id.* at 531, 745 S.E.2d at 393. The Court of Appeals recognized that the challenged action in this case is the sufficiency of the BMPs to be implemented under the SWPPP and that Petitioners failed to present evidence on this issue.

Instead of presenting evidence on the sufficiency of the SWPPP, the Petitioners presented expert testimony that the excavation and lowering of the pond would negatively impact the biological composition of the pond and therefore should have been considered in connection with filling of 0.075 acres of wetlands under Nationwide Permit 29 (“NWP 29”). More specifically, Petitioners argued that there was no valid Nationwide Permit for filling the 0.075 acres of wetlands because the 401 water quality certification issued in 2007 for Nationwide Permits, including NWP 29, included a general condition for consideration of the “overall project proposed or accomplished by a single owner/developer” for any activities covered by a

Nationwide Permit. That argument was rejected by this Court. *Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control and Roper Pond, LLC*, ALC Docket No. 09-ALJ-07-0069-CC, 2010 WL 6782535, *16 (Jan. 21, 2010). Additionally, the Court of Appeals found this general condition to be inapplicable because there was no contention that the excavation of the pond "would result in a discharge into a navigable water." *Town of Arcadia Lakes*, 404 S.C. at 534, 745 S.E.2d at 395). Significantly, in their Proposed Order submitted to this Court on December 3, 2009, Petitioners proposed this argument as a conclusion of law, but failed to cite to any legal authority supporting this argument.

Roper Pond incurred increased costs as a result of the delay in the construction of the Proposed Project. The DHEC decision, which was challenged in this contested case, was issued to Roper Pond by letter dated December 15, 2008. A request for a contested case was filed on February 16, 2009. This Court issued its Final Order and Decision on January 21, 2010. Petitioners thereafter filed a Motion to Reconsider and for Stay on February 16, 2010. The Court denied that Motion on April 1, 2010. As such, the DHEC decision was stayed for not less than thirteen months. Additionally, this delay required Roper Pond to re-apply for certain County permits which had expired during the pendency of the contested case and thus resulted in further delay. Roper Pond claims specific increased costs for the Proposed Project as a result of this delay.

DISCUSSION

I. ATTORNEYS' FEES AND COSTS UNDER S.C. CODE ANN. § 15-77-300

Roper Pond seeks an award of attorneys' fees and costs from the Town pursuant to S.C. CODE ANN. § 15-77-300, which provides, *inter alia*, that fees will be awarded against a political subdivision of the State in a civil action when the political subdivision acted without substantial justification in pressing its claims. Section 15-77-300 ("State Action Statute") provides in relevant part as follows:

(A) In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:

(1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and

(2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

* * *

(C) The provisions of this section do not apply to civil actions relating to the establishment of public utility rates, disciplinary actions by state licensing boards, habeas corpus or post conviction relief actions, child support actions, except as otherwise provided for herein, and child abuse and neglect actions.

S.C. CODE ANN. § 15-77-300(A), (C). The parties do not dispute that the Town is a political subdivision of the State. Additionally, attorneys' fees and costs incurred in an action originating in the ALC are subject to an award under S.C. CODE ANN. § 15-77-300. *See Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue*, 358 S.C. 647, 651-52, 595 S.E.2d 890, 892 (Ct. App. 2004) (reviewing an award of attorneys' fees pursuant to S.C. CODE ANN. § 15-77-300 for fees associated with an appeal originating in the ALC, although the awarding of attorneys' fees occurred in circuit court, an appellate court in the original case, and not the ALC).¹ Therefore, an action brought by the Town before the ALC is subject to the State Action Statute.

In order to recover under the State Action Statute, a party must establish that: "first, the contesting party must be the 'prevailing party;' second, the court must find 'that the agency acted without substantial justification in pressing its claim against the party; and third, the court must find 'that there are no special circumstances that would make an award of attorney's fees unjust.'" *Heath v. County of Aiken (Heath II)*, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990) (quoting *Heath v. Aiken County (Heath I)*, 295 S.C. 416, 420, 368 S.E.2d 904, 906 (1988)). As discussed below, the Court finds that Roper Pond has established each of the three elements required for an award of attorneys' fees and cost under Section 15-77-300.

A. Prevailing Party

On January 21, 2010, this Court issued an order finding that Petitioners lack standing to bring this action and affirming the Department's grant of coverage to Roper Pond under the

¹ Section 15-77-300(C) of the State Action Statute expressly excludes other actions which are within the jurisdiction of the Administrative Law Court. *See* S.C. CODE ANN. § 40-1-160 (2001) (providing that an appeal from the decision of a state licensing board is filed in the ALC); S.C. CODE ANN. § 1-23-310(3) (Supp. 2009) (defining contested case as "a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing"). "The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded." *Stewart v. Richland Memorial Hosp.*, 350 S.C. 589, 594, 567 S.E.2d 510, 513 (Ct. App. 2002) (citation omitted).

Construction General Permit. "The key factor in determining whether a party is a prevailing party is the degree of success obtained by the party seeking attorney's fees." *Douan v. Charleston County Council*, 373 S.C. 384, 386, 645 S.E.2d 241, 243 (2007). The South Carolina Supreme Court has held that "a party need not be successful as to all issues in order to be found to be a prevailing party" under the State Action Statute. *Heath II* at 182, 394 S.E.2d at 711. In *Heath II*, the Court defined "prevailing party" as "[t]he one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered." *Id.* at 182-83, 394 S.E.2d at 711 (quoting *Buza v. Columbia Lumber Co.*, 395 P.2d 511, 514 (1964)). This Court's Final Order found that Petitioners, including the Town, lacked standing in this matter; however, the Court also considered the merits of the issues raised by Petitioners and affirmed the Department's decision to grant Roper Pond coverage under the Construction General Permit. Upon the denial of the Motion to Reconsider, Roper Pond was a prevailing party in this matter. Additionally, the Court of Appeals affirmed this Court's decision on standing and the substantive ruling on the Department's decision to grant Roper Pond coverage under the Construction General Permit. *Town of Arcadia Lakes v. South Carolina Dep't of Health and Envtl. Control*, 404 S.C. 515, 745 S.E.2d 385 (Ct. App. 2013).

The Town argues that Roper Pond is not a prevailing party under Section 15-77-300. As a threshold consideration, Section 15-77-300 provides in relevant part: "In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, **unless the prevailing party is the State or any political subdivision of the State**, the court may allow the prevailing party to recover reasonable attorney's fees . . ." S.C. CODE ANN. § 15-77-300(A) (emphasis added). The Town makes no claim that the Town and the other Petitioners were the prevailing parties, and there is no basis for such claim. This Court found that the Town lacked standing to bring this contested case and further ruled that Petitioners failed to meet the burden of proof that DHEC improperly issued Roper Pond coverage under the Construction General Permit. The Court of Appeals affirmed this Court's ruling on standing and the merits of the case. The Supreme Court dismissed the matter as moot. Therefore, the Town is subject to the award of attorneys' fees and costs under Section 15-77-300 because it is not a prevailing party. This Court ruled in favor of DHEC and Roper Pond in the contested case. The Court of Appeals affirmed this Court's decision, and the Supreme Court's dismissal of the matter

as moot allowed the Court of Appeals' decision to stand. Therefore, Roper Pond is a prevailing party in this case.

The Town argues that Roper Pond is not a prevailing party in this matter because the Supreme Court did not affirm the lower court opinions. This argument imposes a requirement that a ruling be affirmed on appeal in order to entitle the prevailing party to an award of fees and costs under Section 15-77-300. The State Action Statute imposes no such requirement. The award of fees and costs under the State Action Statute is made at the trial court level, and according to the case law, such determination can be made following a ruling/judgment by the trial court prior to any appeal. *See, e.g., Brown v. City of N. Charleston*, 314 S.C. 298, 442 S.E.2d 633 (Ct. App. 1994) (affirming the trial court order granting summary judgment to plaintiffs and reversing the trial court's denial of attorney fees under Section 15-77-300); *Cornelius v. Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006) (affirming trial court's order granting summary judgment to plaintiff and awarding attorney fees under Section 15-77-300). The Supreme Court's failure to affirm the Court of Appeals' decision does not affect Roper Pond's status as a prevailing party in this matter.

Similarly, the Town asserts that "the Supreme Court's decision to dismiss the case as moot does not evidence an intent to allow the Court of Appeal's decision to stand." In dismissing the matter as moot, the Supreme Court recognized that the coverage under the Construction General Permit had been terminated because the construction activities for the Proposed Project had been completed. The Court thus held that that the matter was moot "as it is now impossible for this Court to grant any redress in the context of the issues as framed and litigated below (i.e., modify or revoke authorization for Roper's construction activities under the state-wide permit)." Simply stated, the Supreme Court could not remand the case for modification or revocation of the authorization under the Construction General Permit because the authorization had been terminated. However, in the order dismissing the matter as moot, the Supreme Court did not reverse or vacate the Court of Appeals' decision upholding this Court's final order in the case. The Supreme Court took no action on the Court of Appeals' decision. Had the Supreme Court intended to vacate the lower courts' rulings, the Supreme Court could have taken such action in the Order. *See, e.g., Friends of McLeod, Inc. v. City of Charleston*, 384 S.C. 438, 682 S.E.2d 488 (2009) (dismissing appeal as moot and vacating the Court of Appeals opinion in the matter); *McDill v. Nationwide Mut. Ins. Co.*, 368 S.C. 29, 627 S.E.2d 749 (Ct. App. 2005) (finding that

decision in separate tort action rendered insurance coverage litigation moot and vacating the trial court's order). Similarly, the Supreme Court has issued published opinions dismissing the grant of certiorari and requiring the Court of Appeals to depublish its opinion in the case. *See., e.g., Rivera v. Newton*, 413 S.C. 26, 773 S.E.2d 913 (2015) (dismissing the writ of certiorari as improvidently granted and directing the Court of Appeals to depublish its opinion and stating that the opinion no longer have any precedential effect); *Horton v. City of Columbia*, 413 S.C. 25, 773 S.E.2d 912 (2015) (dismissing the writ of certiorari as improvidently granted and directing the Court of Appeals to depublish its opinion and stating that the opinion no longer have any precedential effect); *Keeter v. Alpine Towers Int'l, Inc.*, 410 S.C. 445, 766 S.E.2d 375 (2014) (dismissing the writ of certiorari as improvidently granted and directing the Court of Appeals to depublish its opinion and stating that the opinion no longer have any precedential effect). In this matter, the Supreme Court's dismissal of the appeal as moot does not affect the validity of this Court's Final Order or the Court of Appeals' decision affirming that Order. The Supreme Court's order does not reverse or vacate the Court of Appeals' decision affirming this Court's Final Order and Decision. The decision of the Court of Appeals stands as a published opinion affirming this Court's Final Order and Decision. *Town of Arcadia Lakes v. South Carolina Dep't of Health and Envtl. Control*, 404 S.C. 515, 745 S.E.2d 385 (Ct. App. 2013).

Moreover, despite the completion of the project, the Supreme Court could have reversed or vacated all or part of the Court of Appeals' decision under one of the exceptions to mootness. "Two exceptions in which the court may address an issue despite mootness are 1) when the issue raised is capable of repetition, yet evading review, and 2) when the question considers matters of important public interest." *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26-27, 630 S.E.2d 474, 478 (2006). The Court could have applied one of the exceptions to the mootness rule and corrected the alleged errors in the standing holding of this Court and the Court of Appeals. However, the Supreme Court did not take such action.

The Town argues that "[t]he fact that the Supreme Court dismissed this case as moot after hearing arguments and indicated a concern that meaningful judicial relief was no longer possible, and without affirming the Court of Appeals, takes 'prevailing party' status off the table." However, the cases cited by the Town in support of this argument are easily distinguished as the mootness determinations in those cases were made prior to the trial court's decision on the merits of each case. In *City of Charleston v. Masi*, 362 S.C. 505, 609 S.E.2d 301 (2005), the Supreme

Court held that the trial court properly declined to award attorney's fees under the State Action Statute where the trial court held the action to be moot by the Supreme Court's decision in another matter. The Supreme Court thus upheld the trial court's denial of attorney's fees, finding that "[t]he District is not a prevailing party because its degree of success is nonexistent given that the circuit court did not specifically find for either party and because this case is being dismissed as moot." 362 S.C. at 510, 609 S.E.2d at 304. As such, since there was no decision by the trial court, there could be no prevailing party for purposes of the State Action Statute. That is not the case here. This Court issued a Final Order and Decision which was affirmed by the Court of Appeals.

Similarly, in *Douan v. Charleston County Council*, 373 S.C. 384, 645 S.E.2d 241 (2007), the plaintiff challenged the County's action alleging that a proposed ordinance and referendum violated state law. Prior to the trial court's decision in that case, the Supreme Court issued a decision in a related case against the county election commission which rendered the action before the trial court moot. Since the trial court did not rule on the merits of the case, the Supreme Court held that the trial court properly held that the plaintiff was not a prevailing party in that action and therefore not entitled to attorneys' fees under the State Action Statute. 373 S.C. at 387, 645 S.E.2d at 243.² Again, this Court issued a Final Order and Decision which was affirmed by the Court of Appeals. Therefore, the holdings in *Masi* and *Douan* do not preclude this Court's finding that Roper Pond is a prevailing party in this matter.

The Town further cites to *Session v. Withers*, 327 S.C. 409, 488 S.E.2d 888 (Ct. App. 1997), in support of its argument that there can be no "prevailing party" when a matter is dismissed as moot on appeal. In that case, the trial court awarded costs to the plaintiff as the prevailing party pursuant to Rule 54, SCRPC, upon a jury verdict in the amount of \$600. The plaintiff thereafter entered into a settlement with the liability insurer under which she agreed to mark the judgment obtained satisfied. 327 S.C. at 417, 488 S.E.2d at 892. Since Rule 54, SCRPC, required that any costs taxed be included in the judgment, the plaintiff could not make claim to such costs since she was contractually obligated not to execute on the judgment. The Court of

² See, also, *Jasper County Bd. of Educ. v. Jasper County Grand Jury*, 303 S.C. 49, 51-52, 398 S.E.2d 498, 499-500 (1990) (holding that party was not a "prevailing party" entitled to recover attorney's fees under Section 15-77-300 where case was dismissed for lack of jurisdiction and thus there was never a resolution on the merits); *Richland County v. Kaiser*, 351 S.C. 89, 97, 567 S.E.2d 260, 264 (Ct. App. 2002) (holding that party was not prevailing party upon reversal of decision in party's favor at the Court of Appeals).

Appeals thus held that the appeal related to the attorney's fees was rendered moot. *Id.* at 417, 488 S.E.2d at 893. It was the inability to execute the judgment which included the costs that rendered the issue moot. Such is not the case here. This Court's Final Order and Decision stands, and there is no contractual impediment to Roper Pond's executing a judgment on this Court's award of attorney's fees under the State Action Statute.

Additionally, the Town argues that the Supreme Court order denying Roper Pond's motion for costs under Rule 222, SCACR, precludes Roper Pond's status as a prevailing party in this action. The Town concedes that "Rule 222 contains no standard for determining whether an award of costs is warranted." Moreover, Rule 222, SCACR, does not refer to "prevailing party" in determining the award of costs. Therefore, the Court's denial of Roper Pond's motion for costs does not affect Roper Pond's status as a prevailing party in this action. Additionally, the Supreme Court recently held that its ruling on a motion for costs under Rule 222, SCACR, has no bearing on a trial court's authority to grant attorney fees under a statute. In *Austin v. Stokes-Craven Holding Corp.*, 406 S.C. 187, 750 S.E.2d 78 (2013), the Supreme Court held that an appellate court's authority to award discretionary appellate attorneys' fees and a circuit court's authority to award appellate and post-appellate attorneys' fees pursuant to South Carolina Regulation of Manufacturers, Distributors, and Dealers Act were not mutually exclusive:

Notably, it is within this Court's discretion whether to award fees and costs under Rule 222. *See* Rule 222(a), (e), SCACR (identifying circumstances for which an appellate court may tax costs on appeal). In contrast, section 56-15-110(a) states that a party who prevails under the Dealer's Act "**shall recover** double the actual damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Emphasis added.) This is a fundamental distinction as a denial of fees under a discretionary rule cannot eliminate a statutory mandate. Thus, we hold that this Court's summary denial of Austin's request for attorney's fees under Rule 222 was not dispositive of his right to seek statutory fees in the circuit court. Moreover, this conclusion is consistent with our jurisprudence interpreting Rule 222 wherein our appellate courts have found that a decision under this rule does not preempt an award of attorney's fees to which one is otherwise entitled, *i.e.*, statutorily authorized. *See Taylor v. Medenica*, 332 S.C. 324, 504 S.E.2d 590 (1998) (awarding Respondents a \$1,000 attorneys' fee and \$81.66 for costs as allowed by Rule 222 and holding that Respondents could seek additional attorneys' fees in the circuit court under the UTPA, which provides for reasonable attorneys' fees and costs); *Muller v. Myrtle Beach Golf & Yacht Club*, 313 S.C. 412, 416, 438 S.E.2d 248, 250 (1993) (finding Appellant waived right to recover appellate costs and fees under Rule 222 as he failed to file an itemized statement of costs prior to the Court's issuance of the remittitur, but holding that Appellant could seek appellate costs in the circuit court based on his statutory right under

section 29-5-10 (authorizing costs incurred for the enforcement of a mechanic's lien) as "Rule 222 does not preempt an award of attorney's fees to which one is otherwise entitled" (citation omitted)); *McDowell v. S.C. Dep't of Soc. Servs.*, 304 S.C. 539, 543, 405 S.E.2d 830, 833 (1991) (holding that an award of attorney's fees under Supreme Court Rule 38 (precursor to Rule 222) did not "preempt an award of attorney's fees to which one is otherwise entitled" and, thus, Appellant could seek an award of attorney's fees pursuant to section 15-77-300, which permits an award of fees for a party prevailing in an action against a state agency); see also *Parker v. Shecut*, 359 S.C. 143, 597 S.E.2d 793 (2004) (recognizing, in a partition action, that whether Respondents were entitled to appellate attorney's fees pursuant to section 15-61-110 was a determination for the circuit court). Accordingly, we find the Court's denial of Austin's Rule 222 motion had no preclusive effect on his attempt to seek statutory attorney fees in the circuit court, including appellate fees and the post-appellate fees incurred in enforcing the judgment against Stokes-Craven.

406 S.C. at 199-200, 750 S.E.2d at 84-85 (second emphasis added). This ruling cites to *McDowell v. S.C. Dep't of Soc. Servs.*, 304 S.C. 539, 543, 405 S.E.2d 830, 833 (1991), which expressly references Section 15-77-300 of the State Action Statute. This ruling affirms that the Supreme Court's denial of costs under Rule 222, SCACR, has no effect on this Court's authority to award attorneys' fees and costs to Roper Pond under Section 15-77-300. Roper Pond is therefore a prevailing party and as will be seen hereafter is entitled to fees and costs under the State Action Statute.

B. Without Substantial Justification

Roper Pond asserts that the Town acted without substantial justification because Petitioners failed to offer evidence at the hearing on the merits to support its allegations that DHEC acted in conflict with established regulations and the relevant case law. "An agency action supported by substantial justification is one which has a reasonable basis in law and fact." *McDowell*, 304 S.C. at 542, 405 S.E.2d at 832 (citing *Pierce v. Underwood*, 108 S. Ct. 2541 (1988)). In *Heath II*, the South Carolina Supreme Court held that "substantial justification," for the purposes of S.C. CODE ANN. § 15-77-300, means "justified to a degree that could satisfy a reasonable person." 302 S.C. at 183, 394 S.E.2d at 712 (quoting *Pierce*, 108 S. Ct. at 2250). However, the South Carolina Supreme Court interprets the State Action Statute to hold state agencies and political subdivisions to a higher standard than other litigants. "[A] court need not go so far as to brand a claim 'frivolous' in order for it to be found to be without substantial justification." *Id.* (citing *Pierce*, 108 S. Ct. at 2251). In *Heath II*, the Court held that the county

council acted without substantial justification because “[t]he statute construed in [the case] was unambiguous, and coupled with the relevant precedent clearly established that the Council’s claims were without merit.” *Id.* at 184, 394 S.E.2d at 712. Therefore, the substantial justification standard in Section 15-77-300 requires a court to examine the established body of law in determining whether a state agency or political subdivision acted “without substantial justification” in pressing a claim. The holding in *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008), further clarifies “substantial justification” for the purposes of S.C. CODE ANN. § 15-77-300:

Substantial justification for purposes of the state action statute means “justified to a degree that could satisfy a reasonable person.” *Heath v. County of Aiken*, 302 S.C. 178, 183, 394 S.E.2d 709, 712 (1990) (quoting *Pierce v. Underwood*, 487 U.S. 552, 564, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988)). Therefore, in deciding whether a state agency acted with substantial justification, the relevant question is whether the agency’s position in litigating the case had a reasonable basis in law and in fact. *McDowell v. S.C. Dept. of Soc. Servs.*, 304 S.C. 539, 542, 405 S.E.2d 830, 832 (1991). Although an agency’s loss on the merits does not create a presumption that its position was not substantially justified, *Video Gaming Consultants, Inc. v. S.C. Dept. of Revenue*, 358 S.C. 647, 650, 595 S.E.2d 890, 892 (Ct. App. 2004), **the substance and outcome of the matter litigated is nevertheless relevant to the determination of whether there was substantial justification in pressing a claim.** *Heath*, 302 S.C. at 183, 394 S.E.2d at 712.

Layman v. State, 376 S.C. 434, 445, 658 S.E.2d 320, 325-26 (2008) (emphasis added). The substance of the Town’s case and the ruling on the evidence presented must be examined in determining whether the Town acted “without substantial justification.”

In the Request for Contested Case Hearing, Petitioners cited a number of state and federal statutes and regulations which the Department’s decision in this matter allegedly violated. The DHEC decision, which was challenged in this matter, was the grant of coverage to Roper Pond under the Construction General Permit. The Department’s decision was based on its review and approval of SWPPP prepared for the Proposed Project. However, at the hearing on the merits, Petitioners offered no evidence that the SWPPP approved by the Department was technically deficient. *Town of Arcadia Lakes v. S.C. Dep’t of Health & Env’tl. Control and Roper Pond, LLC*, ALC Docket No. 09-ALJ-07-0069-CC, 2010 WL 6782535 (Jan. 21, 2010). The Court of Appeals affirmed this Court’s finding on that issue: “We also find significant the absence of any evidence from Appellants that the BMPs to be implemented under the SWPPP were inadequate to prevent

sediment from leaving the construction site.” *Town of Arcadia Lakes*, 404 S.C. at 530-31, 745 S.E.2d at 393 (Ct. App. 2013).

Additionally, since the nature of any deficiencies in the SWPPP would involve technical or specialized knowledge outside of the common knowledge and experience of a trier of fact, it would be expected that Petitioners would have offered an expert to assist the Court in assessing any alleged deficiencies. Rule 702, SCRE. Until Mr. McCall was conflicted out of this case, Petitioners claimed that he offered his expert opinion on these alleged deficiencies. Upon notifying the Town that he could not participate in this litigation, Mr. McCall offered to confer with Brian Bates and recommend other engineering experts to the Petitioners. However, no expert witness was offered for this purpose. Petitioners’ only expert witness offered in this matter admitted that he had not reviewed the SWPPP prepared on behalf of Roper Pond. Therefore, Petitioners failed to present evidence on DHEC’s alleged failure to satisfy the fundamental regulatory requirements on which its decision in this matter was based.

Additionally, Petitioners’ case-in-chief was focused almost exclusively on the dredging of the Pond; however, Petitioners’ expert at trial admitted at trial that he was not qualified to opine on this matter. Petitioners’ expert testified that he has no prior experience in assessing the potential impacts of excavation of a water body. Moreover, while Petitioners’ expert initially opined that the proposed excavation of the pond “will simply destroy the ecosystem that is now present,” he later withdrew that opinion because, as he stated, “I was trying to restrict myself to what I actually knew as opposed to my conjectures.” With respect to the testimony of Petitioners’ expert, the Court of Appeals stated as follows:

Although Reice admitted he previously opined that the proposed excavation of the Pond would have disastrous consequences, he now admitted this was only conjecture. Furthermore, Reice’s primary interest was sedimentation, and he admitted he had no direct experience with excavation. When asked if he believed the land-disturbing activities conducted in conjunction with Roper Pond Apartments would have an adverse impact on Roper Pond, Reice stated only that “[i]t doesn’t sound good” and he would “be surprised if they didn’t,” but declined to offer an expert opinion about the probable results. On cross-examination, Reice also stated he was not provided copies of Roper’s SWPPP and except for what he heard at the hearing, had no knowledge of the BMPs that Roper intended to follow in order to minimize the impact of its construction activities.

Town of Arcadia Lakes, 404 S.C. at 526, 745 S.E.2d at 391.

Instead of presenting evidence on alleged deficiency in the SWPPP, Petitioners argued that Roper Pond did not have the required federal permit for impacts resulting from excavation of the pond on the property. However, the federal law is clear and well-settled that a federal permit is required for excavation of a water body only when such activity is to be conducted in a "navigable water of the United States" under Section 10 of the Federal Rivers and Harbors Act, 33 U.S.C. §§ 401 *et seq.* ("Rivers and Harbors Act"). 33 U.S.C. § 403. This Court found that "Petitioners neither claimed nor presented any evidence that the Pond is a navigable water of the United States under Section 10 of the Rivers and Harbors Act." *Town of Arcadia Lakes v. S.C. Dep't of Health & Env'tl. Control and Roper Pond, LLC*, ALC Docket No. 09-ALJ-07-0069-CC, 2010 WL 6782535, *19 (Jan. 21, 2010). Moreover, Petitioners failed to identify any other federal or state law which required a permit for excavation of the Pond. Instead, Petitioners claimed that a federal permit for excavation of the Pond, which was not required under federal law, was nonetheless required as a general condition of the 401 water quality certification for the Nationwide Permits. Specifically, Petitioners argued that there was no valid Nationwide Permit for filling the 0.075 acres of wetlands because the 401 water quality certification issued in 2007 for Nationwide Permits, including NWP 29, included a general condition for consideration of the "overall project proposed or accomplished by a single owner/developer" for any activities covered by a Nationwide Permit. That argument was rejected by this Court. *Town of Arcadia Lakes v. S.C. Dep't of Health & Env'tl. Control and Roper Pond, LLC*, ALC Docket No. 09-ALJ-07-0069-CC, 2010 WL 6782535, *16 (Jan. 21, 2010). Additionally, the Court of Appeals found this general condition to be inapplicable because there was no contention that the excavation of the pond "would result in a discharge into a navigable water." *Town of Arcadia Lakes*, 404 S.C. at 534, 745 S.E.2d at 395. Moreover, in their Proposed Order submitted to this Court, Petitioners failed to cite to any legal authority supporting this argument.

Petitioners' failure to cite relevant case law or other legal authority for their claims supports a demonstration of "without substantial justification." Although Petitioners' claims might be characterized as novel, the fact that a political subdivision of the State has raised novel issues in an action does not mean that the political subdivision was substantially justified in bringing such action. *Cornelius v. Oconee County*, 369 S.C. 531, 539-40, 633 S.E.2d 492, 497 (2006) (finding that citizen who initiated declaratory judgment action against a county was entitled to attorneys' fees because the fact that novel issues were raised does not mean the county

was substantially justified in opposing the citizen in the declaratory judgment action). The substantial justification standard under Section 15-77-300 requires more than a plausible legal theory on which to bring the contested case. In *Cornelius*, the Supreme Court upheld the award of attorney fees in a declaratory judgment action brought by a county citizen against the county for a wastewater treatment facility funding scheme which violated a county referendum. The county argued that the award of attorney fees under Section 15-77-300 was improper because, *inter alia*, the county “acted with ‘substantial justification’ because there are no preexisting judicial precedents on these issues, merely attorney general opinions.” *Id.* at 538-39, 633 S.E.2d at 496. In upholding the award of attorney fees, the Supreme Court held:

The trial court can award attorneys’ fees under the statute only if it finds the State “agency acted without substantial justification in pressing its claim. . . .” § 15-77-300(1). An agency acts with “substantial justification” within the meaning of the statute when its position has a “reasonable basis in law and fact.” *McDowell v. SCDSS*, 304 S.C. 539, 542, 405 S.E.2d 830, 832 (1991). Contrary to County’s contention, **the fact that novel issues were raised does not mean County was substantially justified in opposing Cornelius.** Declaratory judgment actions by their very nature often present novel questions. *See, e.g. Eargle, supra* (authority of county administrator to suspend elected official’s employees); *United Oil Marketers, supra* (constitutionality of license tax incentive statute for gas/ethanol blend); *Heath v. County of Aiken*, 302 S.C. 178, 394 S.E.2d 709 (1990) (to define relationship between sheriff’s office and county council). Moreover, **County cited no viable authority supporting its position that it was no longer bound by the Referendum’s terms.** We agree with the circuit court that County acted without substantial justification, and no special circumstances render the attorneys’ fee award unjust.

Id. at 539-40, 633 S.E.2d at 496-97 (emphasis added). As such, the fact that there were no prior rulings directly on point as to the claims raised by the county did not preclude a finding that the county acted without substantial justification. Such is the case here. Petitioners advanced a legal theory for which there was no precedential basis in federal or state law. Moreover, despite the wealth of case law interpreting the Clean Water Act, the Rivers and Harbors Act, and the permitting programs established under those Acts, Petitioners continued to press their claim that a 401 Certification issued for a Nationwide Permit in 2007, two years prior to the DHEC decision at issue in this case, required the Department to consider the impacts of the excavation of Roper Pond. The Court of Appeals rejected all of Petitioners’ arguments regarding the sufficiency of the 401 certification and the alleged error in the Department’s failure to consider the impacts of the dredging of the Pond:

Appellants further argue the 401 certification issued by DHEC was insufficient to satisfy the requirements Roper needed to fulfill to obtain a 404 permit because: (1) the 401 certifications that DHEC issued for projects authorized under NWP 29 or NWP 39 could not apply to the excavation of the pond because that activity was not disclosed when Roper applied to the Corps for a 404 permit; (2) the project did not comply with certain general conditions applicable to all NWPs, specifically that DHEC consider the impacts to all land within a project boundary and to adjacent bodies of water or wetlands; (3) DHEC never issued a formal certification that the project met the conditions under NWP 29 for water quality certification; and (4) DHEC failed to conduct the required review for compliance with certain water quality regulations. We hold none of these allegations warrant reversal of the ALC's finding that Roper had an effective 401 certification for its proposed project.

Town of Arcadia Lakes, 404 S.C. at 533-34, 745 S.E.2d at 395. The Court of Appeals also affirmed this Court's ruling that a 404 permit was not required for coverage under the Construction General Permit:

Finally, Appellants take issue with the finding that Roper was entitled to coverage under the State General Permit. They submit two arguments in support of their position. We reject both arguments.

First, Appellants reiterate their previous argument that Roper was not entitled to coverage because the 401 certification was inadequate for a 404 permit, which in turn was a prerequisite for coverage under the State General Permit. We have already determined that the 401 certification that DHEC issued was sufficient for Roper to obtain coverage under NWP 29.

Appellants further contend that the excavation of the pond and lowering of its surface would make the pond a water control structure and would therefore require, under the terms of the State General Permit, a 404 permit from the Corps, which in turn would require a 401 certification. The ALC did not specifically address the question of whether the use of the pond as a water control structure required a 404 permit, and Appellants did not request a ruling in their motion to reconsider. The issue, then, has not been preserved for appellate review, and it would be improper for us to address it now. *See Shealy v. Aiken Cnty.*, 341 S.C. 448, 460, 535 S.E.2d 438, 444-45 (2000) (holding an issue was not preserved for appeal because the trial judge's general ruling was insufficient to preserve the specific issue for appellate review and the appellant did not move to alter or amend the judgment pursuant to Rule 59(e), SCRCP); *Hendrix v. Eastern Distribution, Inc.*, 320 S.C. 218, 218, 464 S.E.2d 112, 113 (1995) (vacating an opinion by this court "to the extent it addressed an issue which was not preserved").

Id. at 536, 745 S.E.2d at 396. Petitioners' presentation of novel legal theories in an attempt to create a 404 permitting requirement where none existed in the well-settled and substantial body

of law was rejected by this Court and the Court of Appeals. Therefore, despite Petitioner's novel legal theories, the Town acted without substantial justification in bring this action.

The Town argues that there was substantial justification to bring this action because "the Town's decision to file the request for contested case hearing was made solely and completely on reliance of the advice of counsel." This argument suggests a showing of "substantial justification" would only require a party to overcome the frivolous filing standard under Rule 11, SCRCP, or the Frivolous Civil Proceedings Sanctions Act, S.C. CODE ANN. § 15-36-10 et seq. ("FCPSA"). *Father v. South Carolina Dep't of Soc. Servs.*, 345 S.C. 57, 72, 545 S.E.2d 523, 531 (Ct. App. 2001) (finding the standard for sanctions under Rule 11 to be essentially the same as that under the FCPSA). The South Carolina Supreme Court has expressly held that a finding of "without substantial justification" does not require a showing that the claims asserted were frivolous. *Heath II*, 302 S.C. at 183, 394 S.E.2d at 712 (holding that "a court need not go so far as to brand a claim 'frivolous' in order for it to be found to be without substantial justification"). As such, a party's reliance on legal advice that it has claims which can be expected to survive a motion for sanctions under Rule 11, SCRCP, or the FCPSA does not shield a party from a finding of "without substantial justification" under Section 15-77-300.

Additionally, if reliance on the advice of counsel were a shield against a finding of "without substantial justification," Section 15-77-300 would be rendered meaningless. The South Carolina appellate courts have upheld a number of lower court findings that a state agency or political subdivision acted "without substantial justification" under Section 15-77-300, and in every reported case, the state agency or political subdivision was represented by counsel. See *Layman v. State*, 376 S.C. 434, 445, 658 S.E.2d 320, 325-26 (2008) (upholding award of attorney fees in class action by state retirees against the State and the South Carolina Retirement System); *Cornelius v. Oconee County*, 369 S.C. 531, 539-40, 633 S.E.2d 492, 497 (2006) (upholding award of attorney fees to citizen who brought declaratory judgment action against the county); *Tennis v. S.C. Dep't of Soc. Servs.*, 355 S.C. 551, 559-60, 585 S.E.2d 312, 317 (Ct. App. 2003) (reversing the denial of attorney fees in daycare operator action against DSS); *Brown v. City of North Charleston*, 314 S.C. 298, 301, 442 S.E.2d 633, 635 (Ct. App. 1994) (reversing trial court's denial of attorney fees for citizen seeking displacement and relocation costs from the city); *Heath II*, 302 S.C. at 183-84, 394 S.E.2d at 712 (upholding award of attorney fees in declaratory judgment action brought by sheriff against the county). The reliance on the advice of

counsel therefore does not preclude a finding that a state agency or political subdivision of the state acted without substantial justification. Additionally, as discussed below, the Supreme Court has recently addressed reliance on legal counsel in the context of an award of attorneys' fees and costs under Section 15-77-300; however, the Supreme Court addressed this argument under the "special circumstances" element of Section 15-77-300—not the determination of "without substantial justification."

The Town further argues that its claims were justified because "if the Supreme Court believed that the case was frivolous or without merit it would not have exercised its discretion and requested briefing and oral arguments." There is no basis for this contention. The Supreme Court regularly grants certiorari to review a decision of the Court of Appeals and then subsequently dismisses the petition for writ of certiorari as improvidently granted following oral arguments. *See, e.g., York County v. South Carolina Dep't of Health and Envtl. Control*, 408 S.C. 180, 758 S.E.2d 187 (2014) (dismissing writ of certiorari as improvidently granted following May 6, 2014 oral argument); *State v. Scott*, 413 S.C. 24, 773 S.E.2d 912 (2015) (missing writ of certiorari as improvidently granted following April 22, 2015 oral argument); *Estate of Atn Burns Livingston v. Livingston*, 412 S.C. 610, 773 S.E.2d 579, 580 (2015) (dismissing writ of certiorari as improvidently granted following May 5, 2015 oral argument). As such, the fact that the Supreme Court granted the petition for writ of certiorari in this matter cannot be construed as the Supreme Court's "clear acknowledgment of the meritorious claims" as the Town contends. The Town improperly interprets the Supreme Court's decision to grant its writ of certiorari as a statement on the merits of the claims at issue.

The Town acted without substantial justification in bringing this action because the Town lacked standing to bring the action. "[S]tanding is a fundamental prerequisite for instituting a legal action..." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 81, 753 S.E.2d 846, 853 (2014). Affirming this Court's Final Order and Decision, the Court of Appeals found that the Town lacked standing because the Town failed to present evidence to show that any of its "professed interests" would result in an injury in fact to the Town or that any alleged injuries "are 'fairly traceable' to the challenged action in this case." *Town of Arcadia Lakes*, 404 S.C. at 531, 745 S.E.2d at 393 (Ct. App. 2013). There is an inherent absence of "substantial justification" for an action where the Town failed to present evidence to establish

standing to challenge the DHEC decision at issue. The Court thus finds that the Town's lack of standing further supports the finding that the Town acted without substantial justification

The Town acted without substantial justification because the Town's primary objective in appealing the Department's decision in this matter was not to challenge the Department's decision to grant Roper Pond coverage under the Construction General Permit, but to stop or delay the construction of an apartment complex on the Roper Pond property. Roper Pond offers the testimony and correspondence of Mr. Thomas, mayor and Rule 30(b)(6) deponent for the Town, as evidence of this intent to stop or delay the Proposed Project. Mr. Thomas testified that there was no opposition to the previous plan to construct condominiums on the Roper Pond property. In an August 23, 2008 email, Mr. Thomas wrote that "the town was misled and deceived in the initial meetings 3+ years ago" by the developer to gain support for rezoning of the Roper Pond property. Mr. Thomas further wrote:

The town should use all necessary means to go before the Richland County Planning Commission and appeal the August 21 Planning Committee recommendation (on numerous reasons of environmental impact, faulty traffic studies and NPDES requirements that have not been studied or met concerning flood control) and to resend [sic] the past zoning change on the grounds of misrepresentation and breach of verbal contract.

Mr. Thomas acknowledged that the Town opposed the planned development of the property for reasons which had nothing to do with the Department's approval of the SWPPP and authorization under the Construction General Permit. Moreover, Mr. Thomas admitted that the Town had no independent knowledge of facts supporting its appeal of the Department's grant of coverage to Roper Pond under the Construction General Permit.

Upon receipt of the December 15, 2008 DHEC decision at issue in this case, Mr. Thomas sent an email to Brian Bates stating that the Town could "send in a blanket appeal to the DHEC Board and delay the actual decision for 60 days." At the close of this email, Mr. Thomas wrote: "Let me know where you think we can go to delay and/or stop this project." The stated objective of this email is further evidenced by the Town's efforts to oppose governmental authorization for the planned development at every opportunity. For example, Mr. Thomas contacted a politician and others to assist the Town in holding up South Carolina Department of Transportation approval for the Proposed Project. Additionally, at its October 2, 2008 council meeting, the Town adopted a resolution to the Richland County Planning Commission regarding development plans

submitted to the County for the Proposed Project. The resolution advised the Commission of the Town's belief that the proposed development, multifamily high density apartments, was "out of character and totally incongruous for the entire town, its neighborhoods, contiguous community and the intended zoning use as originally presented." The resolution further requested that "an economic impact study be performed to determine the loss of property value to the homes in the adjacent Kaminer Station Subdivision, and homes directly affected across Trenholm Road and by adjacent nearby lakes, due to the proposed 204 apartments . . ." This evidence supports Roper Pond's contention that the Town engaged in an comprehensive effort to delay or stop the Proposed Project.

Similarly, Roper Pond argues that meeting with DHEC and governmental authorities were intended to obstruct the development of the Proposed Project and were not intended to facilitate the correction of deficiencies in the SWPPP prepared by B.P. Barber on behalf of Roper Pond. The Town supported the exclusion of B.P. Barber from a meeting with Senator Joel Lourie as a strategy for further delaying the approval of the SWPPP. Brian Bates and Daniel Hill, the professional engineers assisting the Town in its opposition to the Department's approval of the SWPPP, attended a meeting with Senator Lourie on behalf of the Town. The email correspondence regarding this meeting demonstrates the Mr. Thomas agreed with and promoted Mr. Bates' recommendation that B.P. Barber be excluded from the meeting. In a November 6, 2008 email, Mr. Bates advised Mr. Thomas as follows:

Yes I can attend a meeting at that time. As for your phone message about BP Barber, I don't care if they are there, but letting them know our position on their design (assuming we find flaws) that quickly will just expedite their response. I would think that every day that this thing is not resolved is another day it isn't being built. Going through the system is a more formal, civil, and slower method in my opinion. I would rather them keep guessing what our next move is instead of confronting them. Just my thoughts.

Upon receipt of the following email message, Mr. Thomas responded: "I agree with you . . . I will let Joel know that You Danny and I can be there." (ellipses in original). Mr. Thomas thereafter forwarded the email to Senator Lourie with his endorsement of the proposed strategy. This evidence supports Roper Pond's claim that the Town's "concerns" about the SWPPP were merely another avenue in to determine "where you think we can go to delay and/or stop this project."

With respect to the Town's concerns regarding the SWPPP for the Proposed Project, the Town was afforded numerous opportunities to raise those concerns prior to the Department's

decision to grant Roper Pond coverage under the Construction General Permit. The Town provided comments to the Department shortly after the Department staff took over the review of the SWPPP. In an October 29, 2008 email, Mr. Thomas forwarded the Department's review letter for the SWPPP to Mr. Bates and requested that Mr. Bates advise him "if we in Arcadia Lakes need to ask for more." Mr. Bates advised Mr. Thomas to "wait until they try to address this and then bring up the interpretation that this water must be segregated from all of the other runoff." Mr. Thomas responded: "Thanks again for your continued expertise in this matter." This email exchange demonstrates that the Town was raising technical issues to the Department staff, and the Department staff was adequately addressing those issues. Additionally, it shows that the Town's real objective in raising these issues was not to ensure that the SWPPP was technically sufficient to control the stormwater runoff on the property, but to identify potential obstacles to the development of the property. As evidenced by Mr. Thomas's email of December 17, 2008, the Town intended to appeal that decision even if there were no grounds for such appeal. At the hearing on the merits, the Town failed to offer any evidence of a technical deficiency in the SWPPP. The evidence of the Town's efforts to delay or stop the Proposed Project further supports this Court's finding that the Town acted "without substantial justification" in bringing this contested case.

C. Special Circumstances

The Town fails to identify any special circumstances that would make an award under Section 15-77-300 unjust. However, the reliance on advice of counsel has been advanced as a special circumstance in a Section 15-77-300 ruling. In the recent decision in *McNaughton v. Charleston Charter School for Math and Science, Inc.*, 411 S.C. 249, 768 S.E.2d 389 (2015), the Supreme Court addressed the defendant school's reliance on the advice of legal counsel in the context of an award of attorney fees under Section 15-77-300. The Supreme Court affirmed the trial court's verdict in favor of McNaughton on her breach of contract claim against the school and award of attorney fees under Section 15-77-300. On appeal, the school argued that the award of attorney fees was unjust because the principal had received the advice of counsel in making a decision prior to terminating McNaughton. The Supreme Court upheld the circuit court's ruling which rejected this argument:

Appellant also argues that special circumstances exist rendering the award of attorney's fees unjust. *See* S.C. Code Ann. § 15-77-300(B)(2). In particular,

Appellant relies on the fact that the principal solicited legal advice before terminating McNaughton's employment to ensure that the existence of the contingency clause in her employment agreement did not have legal significance. Appellant also cites the contingency clause itself, its students' math scores, and the letter of recommendation provided to McNaughton as special circumstances making attorney's fees unjust. Appellant contends that because its decision to terminate McNaughton's employment was made in good faith and in pursuit of its students' best interests, the trial court should not have awarded attorney's fees.

The trial court rejected these arguments, and found that no special circumstances existed to make an award of attorney's fees unjust in this case. We find the trial court did not abuse its discretion in making this finding, but instead, carefully considered and applied each of the applicable factors in the statute. See Layman, 376 S.C. at 444, 658 S.E.2d at 325. Accordingly, we affirm the trial court's decision to award McNaughton's attorney's fees under section 15-77-300.

Id. at 267-68, 768 S.E.2d at 399. The Town thus cannot rely on the advice of counsel to shield it from an award of attorneys' fees and costs under Section 15-77-300. There are no special circumstances which would make an award of attorneys' fees and costs unjust. The Court thus finds that Roper Pond is entitled to an award of attorneys' fees and costs pursuant to Section 15-77-300 of the State Action Statute.

II. SANCTIONS PURSUANT TO SCALC RULE 72

Roper Pond seeks sanctions against the Town pursuant to SCALC Rule 72, for the costs of delay of the Proposed Project during the pendency of the automatic stay before this Court. Roper Pond asserts that the Town's primary objective in appealing the Department's decision in this matter was not to challenge the technical sufficiency of the SWPPP, but to stop or delay the construction of an apartment complex on the Roper Pond property. As discussed above, Roper Pond cites to the numerous communications between the Town's mayor and the engineers who assisted the Town during DHEC's review of Roper Pond's SWPPP. In a December 17, 2008 email regarding the appeal of the Department's decision on the State Construction General Permit coverage for Roper Pond, Mr. Thomas wrote: "Let me know where you think we can go to delay and/or stop this project." A December 30, 2009 draft of the request for Board review raised issues regarding the Proposed Project, but did not identify any defect in the Department's grant of coverage under the Construction General Permit.

The Town acknowledges that "the Town wanted to slow the process," but disputes that its actions were "solely for the purpose of delay." The evidence on the record demonstrates that the Town opposed the development of the property as an apartment complex. The Town argues that

the request for contested case hearing was not filed solely for the purpose of delay because the Town had other concerns about the proposed development. The Town claims that the contested case was not brought “solely for the purpose of delay” because there were numerous concerns about zoning, compliance with the county land development ordinance, maintaining the character of the Town, diminution in property values in the Town, and faulty traffic impact studies. However, none of these alleged concerns relate to the DHEC decision at issue in this contested case. Moreover, these concerns should be addressed through local zoning and land use authorities. However, the Roper Pond Property is outside of the corporate limits of the Town. Richland County—not the Town—has jurisdiction over zoning and land use issues affecting the Property. The Court thus finds that the Town availed itself of the appeal process authorized under S.C. CODE ANN. § 44-1-60 and the Administrative Procedures Act, S.C. CODE ANN. §§ 1-23-10 *et seq.* (“APA”) in order to redress claims which are properly addressed by and through Richland County zoning and land use authorities.

Additionally, Roper Pond has presented evidence of numerous communications in which the Town’s mayor and those acted on the Town’s behalf admit that Petitioners were challenging the DHEC decision to issue coverage under the General Permit as a means to stop or delay the proposed development. The fundamental regulatory issue in the DHEC decision at issue in this case was the technical sufficiency of the SWPP submitted to DHEC in support of Roper Pond’s request for coverage under the General Permit. However, as this Court and the Court of Appeals held, Petitioners failed to present any evidence regarding any alleged deficiencies in the SWPPP, and neither Petitioner’s expert nor any of the Petitioners even reviewed the SWPPP. *Town of Arcadia Lakes* 404 S.C. at 527-33, 745 S.E.2d at 391-94 (Ct. App. 2013). Moreover, with respect to the Town’s concerns regarding the SWPPP for the Proposed Project, the Town was afforded numerous opportunities to raise those concerns prior to the Department’s decision to grant Roper Pond coverage under the Construction General Permit. Prior to a November 14, 2008 meeting with the Department staff at Senator Lourie’s office, the Town and its technical advisors had reviewed the SWPPP and provided comments to the Department staff, which the staff unquestionably addressed. In an October 2, 2008 email, Mr. Thomas advised Mr. Bates as follows:

Thank you again . . . wish us luck Monday . . . Joel has received a copy of a letter DEHEC sent to the developer telling him that they had pulled the developer’s application and want him to provide all documentation for additional review. Is

the first flush requirements a possible application killer that would require them to reapply. If we could get to that point, we may have [a] chance to get them under the new rules if they approved before they have a chance to reapply. . . RT

It is apparent that the Town provided comments to the Department shortly after the Department staff took over the review of the SWPPP. In an October 29, 2008 email, Mr. Thomas forwarded the Department's review letter for the SWPPP to Brian Bates and requested that Mr. Bates advise him "if we in Arcadia Lakes need to ask for more." Mr. Bates advised Mr. Thomas as follows:

Told you that "waters of the state for water quality" thing had teeth. They now have to show how they are going to collect, and hold for 24 hours, the first inch of runoff from the entire site, which will be approximately 36,000 cubic feet or 271,000 gallons. For visualization purposes, that would be a pond (like the one that was built for those 4 or 5 lots down Trenholm Road) that would be 3-ft. deep and 110-ft. X 110-ft. square or about the volume of the Rockbridge Club swimming pool. To account for that outside of the wetlands boundary, they are going to have to significantly revise the site plans.

I suggest we wait until they try to address this and then bring up the interpretation that this water must be segregated from all of the other runoff. To do that on dense site is an impractical endeavor at best and not usually required due to its complexity. However, a strict interpretation of the regulations indicates that it is required. (emphasis added).

Mr. Thomas responded: "Thanks again for your continued expertise in this matter." This email exchanges demonstrates that the Town was raising technical issues to the Department staff, and the Department staff was adequately addressing those issues. Additionally, it demonstrates that the Town's real objective in raising these issues was not to ensure that the SWPPP was technically sufficient to control the stormwater runoff on the property, but to identify potential obstacles to the development of the property. Otherwise, there would be no suggestion that "we wait until they try to address this and then bring up the interpretation that this water must be segregated from all of the other runoff." Petitioners offered no evidence at the hearing that the concerns raised by the Town and other Petitioners were not fully considered by the Department staff and addressed by Roper Pond's consultant prior to the Department's final decision.

The Town argues that in denying Roper Pond's motion for costs under Rule 222, SCACR, "the Supreme Court implicitly concluded that dismissal on mootness grounds is not a favorable disposition and, after a thorough review of the record, found nothing untoward or evidencing that the case was brought solely for delay such that costs would be warranted." The Town reads too much into the single sentence denying the motion for costs under Rule 222, SCACR. This is

particularly true as it relates to Roper Town's petition for sanctions under SCALC Rule 72. The Supreme Court's Order denying the motion reads as follows: "The Motion for Costs filed on behalf of respondent, Roper Pond, LLC, in the above entitled matter is denied." A review of the record would not provide the Supreme Court with the evidence supporting Roper Pond's claim that the Town brought the contested case solely for the purpose of delay. The record on appeal before the Supreme Court did not include the Mayor's communications prior to bringing the contested case. Additionally, since Roper Pond's April 19, 2010 Petition for Fees, Costs, and Sanctions was held in abeyance during the pendency of the appeal, the parties did not argue this issue in its briefs or oral arguments before the Supreme Court. However, even if such communications were before the Supreme Court, there is no basis for reading the one-sentence order denying Roper Pond's motion for costs as a ruling on the Town's objectives in bringing this action.

The Town argues that sanctions are not warranted because the "appeals process also did nothing to delay the project, as the project went forward to completion regardless." This argument disregards the financial impacts of the substantial delay in the construction of the Proposed Project. The DHEC decision which was challenged in this contested case was issued to Roper Pond by letter dated December 15, 2008. This Court issued its Final Order and Decision on January 21, 2010. Petitioners thereafter filed a Motion to Reconsider and for Stay on February 16, 2010. The Court denied that Motion on April 1, 2010. As such, the DHEC decision was stayed for not less than thirteen months. Additionally, this delay required Roper Pond to re-apply for certain County permits which had expired during the pendency of the contested case and thus resulted in further delay. Accordingly, the Town cannot claim that there was there was no consequence to the delay in the construction of the Proposed Project during the pendency of this contested case.

Roper Pond has presented evidence to demonstrate that the Town availed itself of the contested case procedures established under S.C. CODE ANN. § 44-1-60 and the APA, S.C. CODE ANN. §§ 1-23-10 *et seq.*, for the purpose of stopping or delaying the Proposed Project. SCALC Rule 72, authorizes this Court to impose such sanctions "as the circumstances of the case and discouragement of like conduct in the future may require." SCALC Rule 72. The objective of discouraging like conduct in the future is appropriately achieved by imposing a Rule 72 sanction against the Town. Otherwise, the Town has achieved its stated and improper objective of delaying the Proposed Project by preventing the commencement of construction

for not less than thirteen months. Not only has such action unnecessarily expended valuable judicial resources, it has caused significant economic harm to Roper Pond. The Court therefore finds that sanctions for delay of the Proposed Project are proper.¹

ORDER

IT IS HEREBY ORDERED that Roper Pond is entitled to an award of attorneys' fees and costs under S.C. CODE ANN. § 15-77-300.

IT IS FURTHER ORDERED that sanctions against Petitioner Town of Arcadia Lakes are proper.

AND IT IS SO ORDERED.

Columbia, S.C.
March 15, 2017

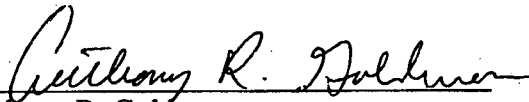

John D. McLeod, Judge
S.C. Administrative Law Court

¹ The Administrative Law Court is not the proper venue in which to seek and recover damages. The type and amount of sanctions is discretionary with the Court.

CERTIFICATE OF SERVICE

I, Anthony R. Goldman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

March 15, 2017
Columbia, S.C.


Anthony R. Goldman
Judicial Law Clerk

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson,
Linda Z. Jackson, Robert E. Williams, Barbara
S. Williams, Elizabeth M. Walker, Louis E.
Spradlin, Mary Helen Spradlin, Thomas Hutto
Utsey, Tony Sinclair, Aaron Small, Bette
Small, Gene F. Starr, M.D., Elaine J. Starr,
Sanford T. Marcus, Ruth L. Marcus, and
Steven Brown,

Petitioners,

vs.

South Carolina Department of Health and
Environmental Control and Roper Pond, LLC,

Respondents.

Docket No. 09-ALC-07-0069-CC

ORDER ON RESPONDENTS'
PETITION FOR ATTORNEYS' FEES
AND COSTS AND FOR SANCTIONS

FILED

SEP 01 2016

SC ADMIN. LAW COURT

This matter comes before the South Carolina Administrative Law Court ("ALC" or "Court") on the Third Amended Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to SCALC Rule 72 ("Petition") filed by Respondent Roper Pond, LLC ("Roper Pond") on November 30, 2015. Roper Pond seeks an award of attorneys' fees and costs from Petitioner Town of Arcadia Lakes ("Town") pursuant to S.C. CODE ANN. § 15-77-300, which provides, *inter alia*, that fees will be awarded against a political subdivision of the State in a civil action when the political subdivision acted without substantial justification in pressing its claims. Roper Pond also seeks sanctions against the Town pursuant to SCALC Rule 72, in the form of an award of attorneys' fees and costs and the cost of delay of Roper Pond's proposed development. By order dated August 3, 2015, the issues for determination on Roper Pond's Petition were bifurcated with the first phase to determine whether Roper Pond is entitled to fees and costs under S.C. CODE ANN. § 15-77-300 and sanctions under SCALC Rule 72, and the second phase to determine the amount of any award of fees and costs and/or sanctions granted in the first phase. The Town filed its Amended Response to Respondent Roper Pond, LLC's Third Amended Petition for Fees, Costs, and Sanctions on February 5, 2016, and Roper Pond filed a reply on February 16, 2016. The Court heard arguments on the first phase determinations on Roper Pond's

Petition on May 9, 2016. For the reasons set forth below, the Court finds that Roper Pond is entitled to an award of attorneys' fees and costs under S.C. CODE ANN. § 15-77-300 and an award of costs of delay of the proposed development as sanctions against the Town pursuant to SCALC Rule 72:

PROCEDURAL HISTORY

By letter dated December 15, 2008, Respondent South Carolina Department of Health and Environmental Control ("Department" or "DHEC") granted Roper Pond coverage under the 2006 NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities ("Construction General Permit"), authorizing land-disturbing activities on 9.6 acres in association with construction of a multi-family residential housing development to be located off Trenholm Road in Richland County ("Proposed Project"). On December 30, 2009, Petitioners the Town, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown (collectively, the "Petitioners") requested that the South Carolina Board of Health and Environmental Control ("Board") review the issuance of the authorization to discharge under the Construction General Permit. By letter dated January 14, 2009, the Clerk of the Board notified Petitioners that the Board had decided not to conduct a review conference as requested. On February 16, 2009, Petitioners filed a Request for Contested Case Hearing, asserting numerous grounds for its appeal of the Department's decision in this matter. At the hearing on the merits, Petitioners' case-in-chief focused almost exclusively on the potential biological impacts of the excavation and lowering of the Pond and allegations that Roper Pond did not have a valid federal permit for the Proposed Project. On January 21, 2010, this Court issued an order finding that the Petitioners lacked standing, but ruling on the merits of the case. The order affirmed the Department's decision to authorize coverage under the Construction General Permit and rejected Petitioners' arguments that Roper Pond failed to obtain the necessary U.S. Army Corps of Engineers' permits and DHEC 401 water quality certification for the Proposed Project.

On February 1, 2010, Petitioners filed a Motion to Reconsider and for Stay. On March 23, 2010, the Court held a hearing to consider Petitioners' Motion to Reconsider and for Stay, and on April 1, 2010, the Court issued an order denying Petitioners' Motion to Reconsider and for Stay. On April 19, 2010, Roper Pond filed a Petition for Attorneys' Fees and Costs and for Sanctions

Pursuant to SCALC Rule 72. On April 20, 2010, Petitioners filed and served a Notice of Appeal of the Court's decision. On May 11, 2010, the Court issued an order holding the Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to SCALC Rule 72, in abeyance pending the resolution of Petitioners' appeal. On March 6, 2013, the Court of Appeals issued a decision upholding this Court's ruling on standing and the merits of the case. On June 12, 2013, the Court of Appeals withdrew its March 6, 2013 Opinion and substituted a new Opinion, again affirming this Court's Final Order and Decision on standing and the merits of the case.

On July 12, 2013, Petitioners filed a petition for writ of certiorari with the Supreme Court. The Supreme Court granted the writ on August 22, 2014. On March 18, 2015, the Supreme Court heard oral arguments. By order dated April 9, 2015, the Supreme Court dismissed the writ of certiorari as moot. The Order stated that "construction activities subject to and authorized by the state-wide general permit have been completed, Roper's coverage under the state-wide general permit has now terminated." The Supreme Court therefore dismissed the matter as moot "as it is now impossible for this Court to grant any redress in the context of the issues as framed and litigated below (i.e., modify or revoke authorization for Roper's construction activities under the state-wide permit)." On May 13, 2015, Roper Pond filed a motion for costs pursuant to Rule 222, SCACR. On June 17, 2015, the Supreme Court issued an order which provided in its entirety: "The Motion for Costs filed on behalf of respondent, Roper Pond, LLC, in the above entitled matter is denied."

FACTUAL BACKGROUND

On September 24, 2008, Roper Pond filed a notice of intent to discharge stormwater associated with the construction of the Proposed Project under the Construction General Permit. A storm water pollution prevention plan ("SWPPP") was submitted with the notice of intent as required by the General Permit and S.C. CODE ANN. REGS. §§ 72-300 *et seq.* ("Stormwater Regulations"). Roper Pond submitted the notice of intent and SWPPP to Richland County for review of the Stormwater Regulations. However, prior to the conclusion of Richland County's review, DHEC requested transfer of the review to the Department because of "concerns that had been raised by citizens about the project." In reviewing a SWPPP, the reviewing entity assesses the proposed Best Management Practices ("BMPs") to determine whether those measures are adequate to meet the requirements of the Stormwater Regulations and of the General Permit. With respect to any potential deficiencies in the SWPPP or the BMPs detailed in the SWPPP, Jill

Stewart, a licensed professional engineer in South Carolina and Manager of the DHEC's Stormwater Permitting Section, testified the SWPPP for any proposed project can be revised as needed to incorporate the appropriate combination of BMPs and implementation procedures necessary to meet the requirements of the General Permit.

During DHEC's review of Roper Pond's request for coverage under the Construction General Permit, citizens of the Town were provided the opportunity to comment on Roper Pond's SWPPP, including meetings with DHEC and other governmental representatives to discuss concerns regarding the Proposed Project. The Town was involved in communications with DHEC and other governmental representatives regarding the Proposed Project. Brian Bates and Daniel Hill, both professional engineers and residents of the Town, assisted the Town in its review of the SWPPP and its opposition to the Proposed Project. In an October 2, 2008 email, Richard Thomas, Mayor of the Town, advised Mr. Bates as follows:

Thank you again . . . wish us luck Monday . . . Joel has received a copy of a letter DEHEC sent to the developer telling him that they had pulled the developer's application and want him to provide all documentation for additional review. Is the first flush requirements a possible application killer that would require them to reapply. If we could get to that point, we may have [a] chance to get them under the new rules if they approved before they have a chance to reapply. . . RT

On October 3, 2008, Mr. Hill emailed Mr. Thomas a summary of concerns identified in his review of Roper Pond's SWPPP. The concerns raised by the Town's consultants were addressed in DHEC's letter to Roper Pond following the Department's review of the SWPPP. In an October 29, 2008 email, Mr. Thomas forwarded the Department's review letter for the SWPPP to Mr. Bates and requested that Mr. Bates advise him "if we in Arcadia Lakes need to ask for more." Mr. Bates advised Mr. Thomas as follows:

Told you that "waters of the state for water quality" thing had teeth. They now have to show how they are going to collect, and hold for 24 hours, the first inch of runoff from the entire site, which will be approximately 36,000 cubic feet or 271,000 gallons. For visualization purposes, that would be a pond (like the one that was built for those 4 or 5 lots down Trenholm Road) that would be 3-ft. deep and 110-ft. X 110-ft. square or about the volume of the Rockbridge Club swimming pool. To account for that outside of the wetlands boundary, they are going to have to significantly revise the site plans.

I suggest we wait until they try to address this and then bring up the interpretation that this water must be segregated from all of the other runoff. To do that on dense site is an impractical endeavor at best and not

usually required due to its complexity. However, a strict interpretation of the regulations indicates that it is required. (emphasis added).

Mr. Thomas responded: "Thanks again for your continued expertise in this matter." Although DHEC was addressing the technical issues raised by the Town, Mr. Bates advised the Town to withhold comments on other potential issues regarding the regulatory sufficiency of the SWPPP.

The Town adhered to this advice when Roper Pond's consultant revised the SWPPP to address the issues raised in DHEC's review letter. In a November 6, 2008 email, Mr. Thomas requested that Mr. Bates and Mr. Hill attend a meeting with DHEC in Senator Joel Lourie's office to "review the revised set of BP Barber plans for the Roper Property." Mr. Bates advised Mr. Thomas as follows:

Yes I can attend a meeting at that time. As for your phone message about BP Barber, I don't care if they are there, but letting them know our position on their design (assuming we find flaws) that quickly will just expedite their response. I would think that every day that this thing is not resolved is another day it isn't being built. Going through the system is a more formal, civil, and slower method in my opinion. I would rather them keep guessing what our next move is instead of confronting them. Just my thoughts.

Upon receipt of the following email message, Mr. Thomas responded: "I agree with you . . . I will let Joel know that You Danny and I can be there." (ellipses in original). Mr. Thomas thereafter forwarded the email to Senator Lourie, advocating Mr. Bates' recommendation to exclude B.P. Barber and Roper Pond from the meeting. There is nothing in the record to indicate that the Town submitted further comments on the revised SWPPP following the November 14, 2008 meeting with DHEC and Senator Lourie.

The Department issued its decision to grant coverage to Roper Pond on December 15, 2008. On December 17, 2008, Mr. Thomas sent an email to Brian Bates regarding the appeal of the Department's decision. Mr. Thomas wrote:

We have until December 30 (15 days) to file an appeal to the DEHEC Board. We need to review the approval and the revised plans to determine if we have a reason or cause to appeal to the Board, **and if not, can we still send in a blanket appeal to the DEHEC Board and delay the actual decision for 60 days.** We need to get our hands on the plans. (emphasis added).

Mr. Thomas thus acknowledges that the Town had not reviewed the final SWPPP approved by DHEC for the Proposed Project. Still, without reviewing the final SWPPP, the Town determined that it should file an appeal of the DHEC decision. At the close of the December 17, 2008 email,

Mr. Thomas wrote: **"Let me know where you think we can go to delay and/or stop this project."** (emphasis added).

On December 30, 2008, the deadline for filing for Board review, Petitioner Linda Jackson forwarded a draft appeal letter to Mr. Thomas. The draft letter raised a number of issues regarding the planned development of the property, but did not identify a single defect in the Department's grant of coverage under the Construction General Permit. The draft letter included the following claims:

Mr. Mundy, who signed the Notice of Intent for this project, has claimed for months that he is not the current owner of the land upon which the project is to be built. The current owner of record is Roper Pond, LLC of which Mr. Mundy was a member. According to Mr. Mundy, Roper Pond, LLC was sold to Capital Development, LLC in January of 2008, however, there is no deed of record to reflect a transfer of interest in the referenced real property. From what we know, the only member of Capital Development, LLC is Charles Mikel who lives in Greenville. This information may or may not have any impact on the decision to issue the stormwater permit, but we believe that the Board need to be informed about who is truly responsible in this situation.

What is significant in this matter is that Mr. Mundy came to the Arcadia Lakes community in May of 2004 with a plan for the subject property to be developed with high end, single-family patio homes with a transition-type design which moved from patio homes to multi-family condominium units, along with a clubhouse and other recreational areas. The original plan for the property was based on a density of approximately four (4) units per acre. The new plan for development of the property presented in early August of this year by Mr. Mundy has no provision for a transition, and in fact has total of eight (8) multi-family apartment buildings with an overall density of approximately sixteen (16) units per acre. We feel that this drastic change in the plans for the property was misleading to adjacent property owners and the local neighborhood in general. Had we not been presented a plan four years ago that was basically satisfactory to the neighborhood, we never would have allowed the County rezoning process to move forward unchallenged. Essentially, the community was duped.

Although the Petitioners filed a different letter requesting Board review, this earlier draft by Ms. Jackson summarizes the actual concerns regarding the Proposed Project, none of which relate to the approval of the SWPPP and coverage under the Construction General Permit.

Prior to filing the request for a contested case hearing, counsel for Petitioners conferred with Gene McCall, an environmental consultant and attorney, regarding potential bases for challenging DHEC's decision to grant Roper Pond coverage under the Construction General Permit. Mr. McCall withdrew from the case because of a conflict but offered to "get with Brian

Bates and we will come up with several names of potential engineering expert witnesses.” In their request for a contested case hearing, Petitioners identified the following alleged defects in the SWPPP:

A. Upon information and belief, Roper Pond, LLC, submitted incorrect and incomplete information to DHEC. Roper Pond, LLC’s Stormwater Pollution Prevention Plan (SWPPP) is deficient and DHEC should not have issued a Construction NPDES Permit for this site:

(1) There are significant defects in the construction and post construction portions of Roper’s SWPPP. The silt fence show on drawing C2 is placed inside the Wetlands Buffer, too close to the wetlands, and in some areas through the wetlands. The Wetlands Buffer area must remain undisturbed to be effective.

(2) The September 2, 2008 Richland County conditional approval states that the maximum driveway width be 24 feet. The Roper drawing C4 shows a 26 foot width. This adds significant impervious area which would cause additional stormwater runoff and additional pollutants. The County conditional approval requires “Preservation of trees in the green area next to the pond.” Based on the existing condition shown on drawing C1 and the Site Planting Plan, it appears that no trees are being preserved in the green area around the pond. Grubbing existing trees in the area around the pond defeats the usefulness of a Wetlands Buffer and will cause sediment to enter the pond.

(3) Roper Pond, LLC’s documents note that zinc is a problem in Cary Lake, but incorrectly states that no zinc will come from its development. It is well documented that zinc is discharged from roof drains or large buildings and from large parking lot areas.

(4) DHEC is not authorized to issue an NPDES Construction Permit where such construction or post construction condition would “cause or contribute” to impairment of the receiving water body, unless, the MS4 is in compliance with its Stormwater Management Plan (SWMP). On its website, Richland County states, “Q. Why is Richland County proposing new stormwater regulations, to include buffers? A. Because Richland County is in violation of the clean water act and has been cited by DHEC . . . And as a result of this violation, we have agreed to change our regulations to address the cited deficiencies. These changes would help Richland County improve the water quality in our community for our residents.” Therefore DHEC cannot issue a new construction permit until the County adopts and applies the improved ordinance.

(5) Roper Pond, LLC’s calculated trapping efficiency for the post construction water quality devices (i.e., Best Management Practices (BMPs)) is flawed. First, the calculations do not properly and adequately address capture of the “first flush” stormwater runoff volume that would come from the site; and thus, the devices are not of adequate size to

capture what is documented to be the most significant portion of a runoff event for transporting pollutants to the receiving water. Second, Roper Pond, LLC, assumes an even distribution of particles, 20% for each of the five particle sizes. This assumed particle distribution is incorrect and yields an inaccurate and incorrect particle trapping efficiency for these BMPs. Also, no oil and grease trapping efficiency was calculated. Leaking vehicle crankcase and transmission oils in parking lots would contain and transport zinc if not properly captured. DHEC should not have approved the Construction NPDES Permit because of these significant deficiencies.

Despite the alleged deficiencies raised by the Town prior to DHEC's December 15, 2008 approval of Roper Pond's SWPPP and the alleged deficiencies asserted in Petitioners' Request for Contested Case Hearing, and contrary to the recommendation of Mr. McCall, Petitioners failed to offer an engineering expert witness to testify at the hearing on the merits. Moreover, Petitioners failed to present any evidence at the hearing on the merits in support of its allegations that the SWPPP and the BMPs proposed in the SWPPP were not sufficient to meet the regulatory requirements. *Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control and Roper Pond, LLC*, ALC Docket No. 09-ALJ-07-0069-CC, 2010 WL 6782535, (Jan. 21, 2010). Petitioners' only expert witness admitted that he did not review the General Permit, the SWPPP, or the BMPs to be implemented under the SWPPP and admitted that he was not able to offer an opinion regarding the sufficiency of such measures. The Town's claims regarding the sufficiency of Roper Pond's SWPPP and the BMPs proposed in the SWPPP were therefore abandoned as a basis for challenging the Proposed Project.

During the 30(b)(6) deposition of the Town, Mr. Thomas, the Town's mayor and designated deponent, failed to identify a factual basis for challenging the sufficiency of the SWPPP. On July 29, 2009, Roper Pond noticed the deposition of the Town pursuant to Rule 30(b)(6), SCRCF. The notice of deposition included the following matters on which the Town was to designate an individual to testify:

2. Actual or threatened harm from the activities authorized under the 2006 NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities ("General Permit") for land-disturbing activities on 9.6 acres in association with construction of a multi-family residential housing development to be located off Trenholm Road in Richland County ("Proposed Project").

* * *

4. The specific manner in which the land-disturbing activities authorized under the General Permit will violate the terms and conditions of the General Permit and/or DHEC Regulations.

The Town designated Mr. Thomas as its sole witness for the Rule 30(b)(6) deposition of the Town. Mr. Thomas holds a master's degree in engineering with a focus on structures of mechanics and environmental engineering. As an engineer licensed by the State, Mr. Thomas has affixed his seal to drawings which include the design of water retention structures. Mr. Thomas is aware of the requirements for the management of stormwater at an improved site. Mr. Thomas testified that he has seen the design drawings for the Proposed Project. Mr. Thomas testified that he would be competent to prepare and seal such drawings. However, Mr. Thomas was unable to testify regarding the topics identified by Roper Pond in its notice of deposition to the Town.

When counsel for Roper Pond asked Mr. Thomas to identify any alleged deficiencies in the SWPPP approved by the Department for the Proposed Project, Mr. Thomas responded that any deficiencies were identified by its attorney in the pleadings in this matter:

Q: All right. Let's talk about that. Tell me—well, let me back up. The current plan.

Tell me what in the current plan you think presents a possibility or probability of harm to Cary Lake.

A: I outlined those before. It will possibly do harm to the water flowing through the project and under North Trenholm Road into Cary Lake.

Q: What is the deficiency in the BP Barber drawings that may lead to the possibility?

A: They're outlined in our petition.

Q: Point them out to me.

A: You want me to read you the document?

Q: No, sir. I want to know what the town's –

A: I'll defer that to Mr. Chandler because he's the legal expert.

Q: He is not my witness, Mr. Thomas. You are my witness and you are the town.

Tell me what facts the town has as we sit here today that allows you to opine that there's a possibility of harm if the BP Barber plan is implemented.

A: Based on what we have been told and led to believe by Mr. Chandler, who is the expert in the legal side of this, there are violations in this plan with regard to the project. The plans and its permitting with DHEC and the U.S. Corp of Engineers.

Q: I want you to step aside and put aside anything Mr. Chandler may have told you. In the absence of Mr. Chandler's comments, is the town aware of any fact upon which it could base an opinion that there is a deficiency in the BP Barber drawings permitted by DHEC?

A: We have hired Mr. Chandler as our spokesman on the legal issues in this case. We believe the case has merit.

Q: Step aside what Mr. Chandler tells you—if Mr. Chandler becomes a witness, we'll deal with this case differently.

What information does the Town of Arcadia Lakes have that, outside of Mr. Chandler's comments to you, leads you to the conclusion that there are deficiencies in the BP Barber design approved by DHEC?

A: We lean on Mr. Chandler's filings and his documentation as the basis for our—

Q: Is Mr. Chandler's complaint the sole source of facts, for the Town of Arcadia Lakes, for it to present a position that the BP Barber drawings are in some way insufficient?

A: I can repeat Mr. Chandler's pleadings and his filings speak to the case that the town and the petitioners—not speaking for them, but as far as the town is concerned—where we are in our position on this project.

Mr. Thomas further testified regarding an allegation of a technical deficiency in the SWPPP:

Q: I assume that you are asserting that that's something wrong with the plans?

A: If Mr. Chandler says that's something wrong, then I agree with Mr. Chandler.

Q: What information did Mr. Chandler rely upon to come to that conclusion?

A: You'd have to talk to Mr. Chandler, because I do not know.

Q: Do you know of any witness on behalf of the Town of Arcadia Lakes, outside of Mr. Chandler, who can tell me how that conclusion was arrived at?

A: Not to my knowledge.

Despite Mr. Thomas's education in environmental engineering, his experience in the design of stormwater retention structures, and his familiarity with the SWPPP, he was unable to identify a single factual allegation related to the purported defects in the SWPPP independent of the filings in this matter.

Although the Town did not present evidence of deficiencies in the SWPPP, the Town identified a number of concerns with the Proposed Project unrelated to DHEC's decision to grant Roper Pond coverage under the Construction General Permit. Mr. Thomas testified at length about the Town's numerous concerns and complaints about the planned development of the Roper Pond property as an apartment complex. Mr. Thomas testified that there was no opposition to the previous plan to construct condominiums on the Roper Pond property. Specifically, Mr. Thomas testified regarding a request from Roper Pond to annex the property into the Town and the support for the development of the property as condominiums and patio homes:

Q: All right. Arcadia Lakes has its own zoning ordinance administered by its own zoning board?

A: That's correct.

Q: Why did you not suggest that he make an appeal to your zoning board?

A: It was easier—we thought it was easier for them to do it the other way. I don't remember what the context was then.

Q: Were you concerned that the citizens would oppose that kind of zoning?

A: No. As a matter of fact from the condo standpoint, out of the 15 or 20 small zero lot line patio homes, we had as many as 10 that were spoken for by town's people that wanted to retire and no longer do yard work and still be in the town.

Our town is a very close town. We have almost 900 residents and we are a very, very close knit town. People don't want to move out of the town once they move in.

There are a lot of amenities in the town that are very, very good. For instance, there's no taxes. We don't have any town taxes. We deal off of County taxes, revenue sharing, franchise fees, business licenses. Those type of things. We run the town off of a very lean budget.

Q: So you, for whatever reason, suggested that rather than annexing him in and changing your zoning—

A: We couldn't do that. It was my understanding at that time that that was not an option.

Q: For what reason?

A: If we annexed him in, then he would be annexed in as the existing zoning. And he didn't want the existing zoning, which was residential, light commercial. He wanted multifamily.

Q: So to solve that you suggested he get the County to change it, and then you can bring him in, grandfather him in, or bring him in subject to that zoning?

A: Correct.

Q: And you thought that would work?

A: With the plans that he had then, everyone was very much in favor of those. The plans were very high-end condos, low density, a lot of amenities, and fit in with the -- --

Q: Understanding that we're talking hindsight, but the feeling at the time was that if he had gone forward with that project of patio homes to condominiums, it would have been supported by the town and you could have brought it in, annexed it in, subject to the County zoning?

A: --with the plans that were presented to us at that time, we did not have any major problems with those plans at that time that I can recall.

Q: You would have recommended bringing it into the city by annexation?

A: Correct.

Q: And you had citizens in the town who were in favor of it and who actually wanted to live in the patio homes?

A: That's correct.

The opposition to the development began upon learning that the property would be developed as an apartment project. Mr. Thomas testified:

Q: As of October 2nd, was one of your reasons for opposing this project as mayor of the Town of Arcadia lakes, the potential for individual unit owners to have their property values depressed?

A: Yes. That was one of the reasons we wanted an economic study done to determine that.

Q: Is that one of the reasons you wanted to stop this project?

A: That was one of the reasons for our opposition to the project as it was presented.

Q: And do I understand you to say that as it was presented, the primary concern was the additional density over and above what was presented to you in 2004?

A: No. It was also the economic impact. It was also the character of the neighborhood.

Q: Well, you did not oppose the townhouses, patio homes, condominiums, correct? You personally wanted to buy one.

A: True.

Q: What factor, other than the density of the apartments, led you to believe there would be a depression in economic value for certain homeowners in Arcadia Lakes?

A: Safety to you, to the transient nature of the folks renting the property, light intrusion into the actual property adjoined, potential overflow of the sewer system due to the fact—did it actually—was it sized properly to handle an additional 204 units. I mean, the town only has 890 people living in the town. You're adding another 4-500 residents to the system, traffic. All those had—all those come together—all of that has to do with the density.

Q: All of those factors arise out of the increase density, right?

A: That's the way I see it.

The Town believed that the developers of the Proposed Project had misled the Town to obtain support for the rezoning of the property. For example, in an August 23, 2008 email, Mr. Thomas wrote:

I believe that the town was misled and deceived in the initial meetings 3+ years ago when the same developer came to us for our support and the support of the adjacent neighborhood to rezone and then used the rezoning to restructure his plans for monetary gain. Per conversation with Mr. Carter Ellis, the same was told to the property owners on the north side of the Roper Property to get their blessing for the rezoning. The town should use all necessary means to go before the Richland County Planning Commission and appeal the August 21 Planning Committee recommendation (on numerous reasons of environmental impact, faulty traffic studies and NPDES requirements that have not been studied or met concerning flood control) and to resend [sic] the past zoning change on the grounds of misrepresentation and breach of verbal contract.

In addition to the appeal of DHEC's decision to grant Roper Pond coverage under the Construction General Permit for the Proposed Project, the Town opposed other governmental authorizations for the Proposed Project. For example, Mr. Thomas contacted a politician and others to assist the Town in holding up South Carolina Department of Transportation approval for the Proposed Project. Additionally, at its October 2, 2008 council meeting, the Town adopted a resolution to the Richland County Planning Commission regarding development plans submitted to the County for the Proposed Project. The Resolution advised the Commission of the Town's belief that the proposed development, multifamily high density apartments, was "out of character and totally incongruous for the entire town, its neighborhoods, contiguous community and the intended zoning use as originally presented." The resolution further requested that "an economic impact study be performed to determine the loss of property value to the homes in the adjacent Kaminer Station Subdivision, and homes directly affected across Trenholm Road and by adjacent nearby lakes, due to the proposed 204 apartments . . ."

In affirming this Court's ruling on the Town's lack of standing, the Court of Appeals held:

The ALC found the Town did not satisfy the first element required to establish standing, namely, that it had a personal stake in the litigation. *Quoting Glaze v. Grooms*, 324 S.C. 249, 255, 478 S.E.2d 841, 845 (1996), the ALC referenced the general rule that "a municipality must allege an infringement of its own proprietary interests or statutory rights to establish standing." In response to this statement, Appellants advocate a broad interpretation of the term "proprietary interest" in determining whether the Town has demonstrated an injury in fact sufficient to confer standing. In the present case, Appellants argue "proprietary interests" include: (1) the Town's interest in protecting the environmental quality of Cary Lake, which lies partly within the Town borders; (2) the Town's ability to comply with federal law, such as NPDES regulations; (3) the Town's interest in maintaining its character and desirable attributes, including its aesthetic appeal:

and (4) the diminution of property values within the Town and other adverse effects of a nearby apartment complex on such concerns as security and traffic congestion. We hold that none of these professed interests, whether “proprietary” or not, are sufficient to confer standing on the Town in this case.

As to the first two concerns, Town Mayor Richard Thomas testified in a deposition that the Town had no ownership interest in Cary Lake. Mayor Thomas gave a brief statement that under NPDES regulations, the Town was responsible for water that flowed out of Cary Lake, but provided no supporting authority for this assertion. Moreover, he acknowledged the Town is not responsible for the maintenance of Cary Lake, has never allocated funds for this purpose, and has never incurred any fines under NPDES regulations despite alleged problems in the past with water flowing into Cary Lake. He also stated that Cary Lake is the “bottom lake,” that is, the final lake into which the remaining six lakes flow. We also find significant the absence of any evidence from Appellants that the BMPs to be implemented under the SWPPP were inadequate to prevent sediment from leaving the construction site; thus, Appellants have also failed to show their alleged injuries are “fairly traceable” to the challenged action in this case. Similarly, Appellants authorization of coverage to Roper for land-disturbing activities under the State General Permit and either of their two remaining concerns. Therefore, pursuant to section 1-23-610, we affirm the ALC’s determination that the Town lacks standing.

Town of Arcadia Lakes v. South Carolina Dep’t of Health and Envtl. Control, 404 S.C. 515, 529-31, 745 S.E.2d 385, 393 (Ct. App. 2013). In affirming this Court’s ruling, the Court of Appeals noted the “absence of any evidence from Appellants that the BMPs to be implemented under the SWPPP were inadequate to prevent sediment from leaving the construction site; thus, Appellants have also failed to show their alleged injuries are ‘fairly traceable’ to the challenged action in this case.” *Id.* at 531, 745 S.E.2d at 393. The Court of Appeals recognized that the challenged action in this case is the sufficiency of the BMPs to be implemented under the SWPPP and that Petitioners failed to present evidence on this issue.

Instead of presenting evidence on the sufficiency of the SWPPP, the Petitioners presented expert testimony that the excavation and lowering of the pond would negatively impact the biological composition of the pond and therefore should have been considered in connection with filling of 0.075 acres of wetlands under Nationwide Permit 29 (“NWP 29”). More specifically, Petitioners argued that there was no valid Nationwide Permit for filling the 0.075 acres of wetlands because the 401 water quality certification issued in 2007 for Nationwide Permits, including NWP 29, included a general condition for consideration of the “overall project proposed or accomplished by a single owner/developer” for any activities covered by a

Nationwide Permit. That argument was rejected by this Court. *Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control and Roper Pond, LLC*, ALC Docket No. 09-ALJ-07-0069-CC, 2010 WL 6782535, *16 (Jan. 21, 2010). Additionally, the Court of Appeals found this general condition to be inapplicable because there was no contention that the excavation of the pond "would result in a discharge into a navigable water." *Town of Arcadia Lakes*, 404 S.C. at 534, 745 S.E.2d at 395). Significantly, in their Proposed Order submitted to this Court on December 3, 2009, Petitioners proposed this argument as a conclusion of law, but failed to cite to any legal authority supporting this argument.

Roper Pond incurred increased costs as a result of the delay in the construction of the Proposed Project. The DHEC decision, which was challenged in this contested case, was issued to Roper Pond by letter dated December 15, 2008. A request for a contested case was filed on February 16, 2009. This Court issued its Final Order and Decision on January 21, 2010. Petitioners thereafter filed a Motion to Reconsider and for Stay on February 16, 2010. The Court denied that Motion on April 1, 2010. As such, the DHEC decision was stayed for not less than thirteen months. Additionally, this delay required Roper Pond to re-apply for certain County permits which had expired during the pendency of the contested case and thus resulted in further delay. Roper Pond claims specific increased costs for the Proposed Project as a result of this delay.

DISCUSSION

I. ATTORNEYS' FEES AND COSTS UNDER S.C. CODE ANN. § 15-77-300

Roper Pond seeks an award of attorneys' fees and costs from the Town pursuant to S.C. CODE ANN. § 15-77-300, which provides, *inter alia*, that fees will be awarded against a political subdivision of the State in a civil action when the political subdivision acted without substantial justification in pressing its claims. Section 15-77-300 ("State Action Statute") provides in relevant part as follows:

(A) In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:

(1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and

(2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

* * *

(C) The provisions of this section do not apply to civil actions relating to the establishment of public utility rates, disciplinary actions by state licensing boards, habeas corpus or post conviction relief actions, child support actions, except as otherwise provided for herein, and child abuse and neglect actions.

S.C. CODE ANN. § 15-77-300(A), (C). The parties do not dispute that the Town is a political subdivision of the State. Additionally, attorneys' fees and costs incurred in an action originating in the ALC are subject to an award under S.C. CODE ANN. § 15-77-300. *See Video Gaming Consultants, Inc. v. South Carolina Dep't of Revenue*, 358 S.C. 647, 651-52, 595 S.E.2d 890, 892 (Ct. App. 2004) (reviewing an award of attorneys' fees pursuant to S.C. CODE ANN. § 15-77-300 for fees associated with an appeal originating in the ALC, although the awarding of attorneys' fees occurred in circuit court, an appellate court in the original case, and not the ALC).¹ Therefore, an action brought by the Town before the ALC is subject to the State Action Statute.

In order to recover under the State Action Statute, a party must establish that: "first, the contesting party must be the 'prevailing party;' second, the court must find 'that the agency acted without substantial justification in pressing its claim against the party; and third, the court must find 'that there are no special circumstances that would make an award of attorney's fees unjust.'" *Heath v. County of Aiken (Heath II)*, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990) (quoting *Heath v. Aiken County (Heath I)*, 295 S.C. 416, 420, 368 S.E.2d 904, 906 (1988)). As discussed below, the Court finds that Roper Pond has established each of the three elements required for an award of attorneys' fees and cost under Section 15-77-300.

A. Prevailing Party

On January 21, 2010, this Court issued an order finding that Petitioners lack standing to bring this action and affirming the Department's grant of coverage to Roper Pond under the

¹ Section 15-77-300(C) of the State Action Statute expressly excludes other actions which are within the jurisdiction of the Administrative Law Court. *See* S.C. CODE ANN. § 40-1-160 (2001) (providing that an appeal from the decision of a state licensing board is filed in the ALC); S.C. CODE ANN. § 1-23-310(3) (Supp. 2009) (defining contested case as "a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing"). "The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded." *Stewart v. Richland Memorial Hosp.*, 350 S.C. 589, 594, 567 S.E.2d 510, 513 (Ct. App. 2002) (citation omitted).

Construction General Permit. “The key factor in determining whether a party is a prevailing party is the degree of success obtained by the party seeking attorney’s fees.” *Douan v. Charleston County Council*, 373 S.C. 384, 386, 645 S.E.2d 241, 243 (2007). The South Carolina Supreme Court has held that “a party need not be successful as to all issues in order to be found to be a prevailing party” under the State Action Statute. *Heath II* at 182, 394 S.E.2d at 711. In *Heath II*, the Court defined “prevailing party” as “[t]he one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered.” *Id.* at 182-83, 394 S.E.2d at 711 (quoting *Buza v. Columbia Lumber Co.*, 395 P.2d 511, 514 (1964)). This Court’s Final Order found that Petitioners, including the Town, lacked standing in this matter; however, the Court also considered the merits of the issues raised by Petitioners and affirmed the Department’s decision to grant Roper Pond coverage under the Construction General Permit. Upon the denial of the Motion to Reconsider, Roper Pond was a prevailing party in this matter. Additionally, the Court of Appeals affirmed this Court’s decision on standing and the substantive ruling on the Department’s decision to grant Roper Pond coverage under the Construction General Permit. *Town of Arcadia Lakes v. South Carolina Dep’t of Health and Envtl. Control*, 404 S.C. 515, 745 S.E.2d 385 (Ct. App. 2013).

The Town argues that Roper Pond is not a prevailing party under Section 15-77-300. As a threshold consideration, Section 15-77-300 provides in relevant part: “In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, **unless the prevailing party is the State or any political subdivision of the State**, the court may allow the prevailing party to recover reasonable attorney’s fees . . .” S.C. CODE ANN. § 15-77-300(A) (emphasis added). The Town makes no claim that the Town and the other Petitioners were the prevailing parties, and there is no basis for such claim. This Court found that the Town lacked standing to bring this contested case and further ruled that Petitioners failed to meet the burden of proof that DHEC improperly issued Roper Pond coverage under the Construction General Permit. The Court of Appeals affirmed this Court’s ruling on standing and the merits of the case. The Supreme Court dismissed the matter as moot. Therefore, the Town is subject to the award of attorneys’ fees and costs under Section 15-77-300 because it is not a prevailing party. This Court ruled in favor of DHEC and Roper Pond in the contested case. The Court of Appeals affirmed this Court’s decision, and the Supreme Court’s dismissal of the matter

as moot allowed the Court of Appeals' decision to stand. Therefore, Roper Pond is a prevailing party in this case.

The Town argues that Roper Pond is not a prevailing party in this matter because the Supreme Court did not affirm the lower court opinions. This argument imposes a requirement that a ruling be affirmed on appeal in order to entitle the prevailing party to an award of fees and costs under Section 15-77-300. The State Action Statute imposes no such requirement. The award of fees and costs under the State Action Statute is made at the trial court level, and according to the case law, such determination can be made following a ruling/judgment by the trial court prior to any appeal. *See, e.g., Brown v. City of N. Charleston*, 314 S.C. 298, 442 S.E.2d 633 (Ct. App. 1994) (affirming the trial court order granting summary judgment to plaintiffs and reversing the trial court's denial of attorney fees under Section 15-77-300); *Cornelius v. Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006) (affirming trial court's order granting summary judgment to plaintiff and awarding attorney fees under Section 15-77-300). The Supreme Court's failure to affirm the Court of Appeals' decision does not affect Roper Pond's status as a prevailing party in this matter.

Similarly, the Town asserts that "the Supreme Court's decision to dismiss the case as moot does not evidence an intent to allow the Court of Appeal's decision to stand." In dismissing the matter as moot, the Supreme Court recognized that the coverage under the Construction General Permit had been terminated because the construction activities for the Proposed Project had been completed. The Court thus held that that the matter was moot "as it is now impossible for this Court to grant any redress in the context of the issues as framed and litigated below (i.e., modify or revoke authorization for Roper's construction activities under the state-wide permit)." Simply stated, the Supreme Court could not remand the case for modification or revocation of the authorization under the Construction General Permit because the authorization had been terminated. However, in the order dismissing the matter as moot, the Supreme Court did not reverse or vacate the Court of Appeals' decision upholding this Court's final order in the case. The Supreme Court took no action on the Court of Appeals' decision. Had the Supreme Court intended to vacate the lower courts' rulings, the Supreme Court could have taken such action in the Order. *See, e.g., Friends of McLeod, Inc. v. City of Charleston*, 384 S.C. 438, 682 S.E.2d 488 (2009) (dismissing appeal as moot and vacating the Court of Appeals opinion in the matter); *McDill v. Nationwide Mut. Ins. Co.*, 368 S.C. 29, 627 S.E.2d 749 (Ct. App. 2005) (finding that

decision in separate tort action rendered insurance coverage litigation moot and vacating the trial court's order). Similarly, the Supreme Court has issued published opinions dismissing the grant of certiorari and requiring the Court of Appeals to depublish its opinion in the case. *See, e.g., Rivera v. Newton*, 413 S.C. 26, 773 S.E.2d 913 (2015) (dismissing the writ of certiorari as improvidently granted and directing the Court of Appeals to depublish its opinion and stating that the opinion no longer have any precedential effect); *Horton v. City of Columbia*, 413 S.C. 25, 773 S.E.2d 912 (2015) (dismissing the writ of certiorari as improvidently granted and directing the Court of Appeals to depublish its opinion and stating that the opinion no longer have any precedential effect); *Keeter v. Alpine Towers Int'l, Inc.*, 410 S.C. 445, 766 S.E.2d 375 (2014) (dismissing the writ of certiorari as improvidently granted and directing the Court of Appeals to depublish its opinion and stating that the opinion no longer have any precedential effect). In this matter, the Supreme Court's dismissal of the appeal as moot does not affect the validity of this Court's Final Order or the Court of Appeals' decision affirming that Order. The Supreme Court's order does not reverse or vacate the Court of Appeals' decision affirming this Court's Final Order and Decision. The decision of the Court of Appeals stands as a published opinion affirming this Court's Final Order and Decision. *Town of Arcadia Lakes v. South Carolina Dep't of Health and Envtl. Control*, 404 S.C. 515, 745 S.E.2d 385 (Ct. App. 2013).

Moreover, despite the completion of the project, the Supreme Court could have reversed or vacated all or part of the Court of Appeals' decision under one of the exceptions to mootness. "Two exceptions in which the court may address an issue despite mootness are 1) when the issue raised is capable of repetition, yet evading review, and 2) when the question considers matters of important public interest." *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26-27, 630 S.E.2d 474, 478 (2006). The Court could have applied one of the exceptions to the mootness rule and corrected the alleged errors in the standing holding of this Court and the Court of Appeals. However, the Supreme Court did not take such action.

The Town argues that "[t]he fact that the Supreme Court dismissed this case as moot after hearing arguments and indicated a concern that meaningful judicial relief was no longer possible, and without affirming the Court of Appeals, takes 'prevailing party' status off the table." However, the cases cited by the Town in support of this argument are easily distinguished as the mootness determinations in those cases were made prior to the trial court's decision on the merits of each case. In *City of Charleston v. Masi*, 362 S.C. 505, 609 S.E.2d 301 (2005), the Supreme

Court held that the trial court properly declined to award attorney's fees under the State Action Statute where the trial court held the action to be moot by the Supreme Court's decision in another matter. The Supreme Court thus upheld the trial court's denial of attorney's fees, finding that "[t]he District is not a prevailing party because its degree of success is nonexistent given that the circuit court did not specifically find for either party and because this case is being dismissed as moot." 362 S.C. at 510, 609 S.E.2d at 304. As such, since there was no decision by the trial court, there could be no prevailing party for purposes of the State Action Statute. That is not the case here. This Court issued a Final Order and Decision which was affirmed by the Court of Appeals.

Similarly, in *Douan v. Charleston County Council*, 373 S.C. 384, 645 S.E.2d 241 (2007), the plaintiff challenged the County's action alleging that a proposed ordinance and referendum violated state law. Prior to the trial court's decision in that case, the Supreme Court issued a decision in a related case against the county election commission which rendered the action before the trial court moot. Since the trial court did not rule on the merits of the case, the Supreme Court held that the trial court properly held that the plaintiff was not a prevailing party in that action and therefore not entitled to attorneys' fees under the State Action Statute. 373 S.C. at 387, 645 S.E.2d at 243.² Again, this Court issued a Final Order and Decision which was affirmed by the Court of Appeals. Therefore, the holdings in *Masi* and *Douan* do not preclude this Court's finding that Roper Pond is a prevailing party in this matter.

The Town further cites to *Session v. Withers*, 327 S.C. 409, 488 S.E.2d 888 (Ct. App. 1997), in support of its argument that there can be no "prevailing party" when a matter is dismissed as moot on appeal. In that case, the trial court awarded costs to the plaintiff as the prevailing party pursuant to Rule 54, SCRCP, upon a jury verdict in the amount of \$600. The plaintiff thereafter entered into a settlement with the liability insurer under which she agreed to mark the judgment obtained satisfied. 327 S.C. at 417, 488 S.E.2d at 892. Since Rule 54, SCRCP, required that any costs taxed be included in the judgment, the plaintiff could not make claim to such costs since she was contractually obligated not to execute on the judgment. The Court of

² See, also, *Jasper County Bd. of Educ. v. Jasper County Grand Jury*, 303 S.C. 49, 51-52, 398 S.E.2d 498, 499-500 (1990) (holding that party was not a "prevailing party" entitled to recover attorney's fees under Section 15-77-300 where case was dismissed for lack of jurisdiction and thus there was never a resolution on the merits); *Richland County v. Kaiser*, 351 S.C. 189, 197, 567 S.E.2d 260, 264 (Ct. App. 2002) (holding that party was not prevailing party upon reversal of decision in party's favor at the Court of Appeals).

Appeals thus held that the appeal related to the attorney's fees was rendered moot. *Id.* at 417, 488 S.E.2d at 893. It was the inability to execute the judgment which included the costs that rendered the issue moot. Such is not the case here. This Court's Final Order and Decision stands, and there is no contractual impediment to Roper Pond's executing a judgment on this Court's award of attorney's fees under the State Action Statute.

Additionally, the Town argues that the Supreme Court order denying Roper Pond's motion for costs under Rule 222, SCACR, precludes Roper Pond's status as a prevailing party in this action. The Town concedes that "Rule 222 contains no standard for determining whether an award of costs is warranted." Moreover, Rule 222, SCACR, does not refer to "prevailing party" in determining the award of costs. Therefore, the Court's denial of Roper Pond's motion for costs does not affect Roper Pond's status as a prevailing party in this action. Additionally, the Supreme Court recently held that its ruling on a motion for costs under Rule 222, SCACR, has no bearing on a trial court's authority to grant attorney fees under a statute. In *Austin v. Stokes-Craven Holding Corp.*, 406 S.C. 187, 750 S.E.2d 78 (2013), the Supreme Court held that an appellate court's authority to award discretionary appellate attorneys' fees and a circuit court's authority to award appellate and post-appellate attorneys' fees pursuant to South Carolina Regulation of Manufacturers, Distributors, and Dealers Act were not mutually exclusive:

Notably, it is within this Court's discretion whether to award fees and costs under Rule 222. *See* Rule 222(a), (e), SCACR (identifying circumstances for which an appellate court may tax costs on appeal). In contrast, section 56-15-110(a) states that a party who prevails under the Dealer's Act "**shall recover** double the actual damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Emphasis added.) This is a fundamental distinction as a denial of fees under a discretionary rule cannot eliminate a statutory mandate. Thus, we hold that this Court's summary denial of Austin's request for attorney's fees under Rule 222 was not dispositive of his right to seek statutory fees in the circuit court. Moreover, this conclusion is consistent with our jurisprudence interpreting Rule 222 wherein our appellate courts have found that a decision under this rule does not preempt an award of attorney's fees to which one is otherwise entitled, *i.e.*, statutorily authorized. *See Taylor v. Medenica*, 332 S.C. 324, 504 S.E.2d 590 (1998) (awarding Respondents a \$1,000 attorneys' fee and \$81.66 for costs as allowed by Rule 222 and holding that Respondents could seek additional attorneys' fees in the circuit court under the UTPA, which provides for reasonable attorneys' fees and costs); *Muller v. Myrtle Beach Golf & Yacht Club*, 313 S.C. 412, 416, 438 S.E.2d 248, 250 (1993) (finding Appellant waived right to recover appellate costs and fees under Rule 222 as he failed to file an itemized statement of costs prior to the Court's issuance of the remittitur, but holding that Appellant could seek appellate costs in the circuit court based on his statutory right under

section 29-5-10 (authorizing costs incurred for the enforcement of a mechanic's lien) as "Rule 222 does not preempt an award of attorney's fees to which one is otherwise entitled" (citation omitted)); *McDowell v. S.C. Dep't of Soc. Servs.*, 304 S.C. 539, 543, 405 S.E.2d 830, 833 (1991) (holding that an award of attorney's fees under Supreme Court Rule 38 (precursor to Rule 222) did not "preempt an award of attorney's fees to which one is otherwise entitled" and, thus, Appellant could seek an award of attorney's fees pursuant to section 15-77-300, which permits an award of fees for a party prevailing in an action against a state agency); see also *Parker v. Shecut*, 359 S.C. 143, 597 S.E.2d 793 (2004) (recognizing, in a partition action, that whether Respondents were entitled to appellate attorney's fees pursuant to section 15-61-110 was a determination for the circuit court). Accordingly, we find the Court's denial of Austin's Rule 222 motion had no preclusive effect on his attempt to seek statutory attorney fees in the circuit court, including appellate fees and the post-appellate fees incurred in enforcing the judgment against Stokes-Craven.

406 S.C. at 199-200, 750 S.E.2d at 84-85 (second emphasis added). This ruling cites to *McDowell v. S.C. Dep't of Soc. Servs.*, 304 S.C. 539, 543, 405 S.E.2d 830, 833 (1991), which expressly references Section 15-77-300 of the State Action Statute. This ruling affirms that the Supreme Court's denial of costs under Rule 222, SCACR, has no effect on this Court's authority to award attorneys' fees and costs to Roper Pond under Section 15-77-300. Roper Pond is therefore a prevailing party and as will be seen hereafter is entitled to fees and costs under the State Action Statute.

B. Without Substantial Justification

Roper Pond asserts that the Town acted without substantial justification because Petitioners failed to offer evidence at the hearing on the merits to support its allegations that DHEC acted in conflict with established regulations and the relevant case law. "An agency action supported by substantial justification is one which has a reasonable basis in law and fact." *McDowell*, 304 S.C. at 542, 405 S.E.2d at 832 (citing *Pierce v. Underwood*, 108 S. Ct. 2541 (1988)). In *Heath II*, the South Carolina Supreme Court held that "substantial justification," for the purposes of S.C. CODE ANN. § 15-77-300, means "justified to a degree that could satisfy a reasonable person." 302 S.C. at 183, 394 S.E.2d at 712 (quoting *Pierce*, 108 S. Ct. at 2250). However, the South Carolina Supreme Court interprets the State Action Statute to hold state agencies and political subdivisions to a higher standard than other litigants. "[A] court need not go so far as to brand a claim 'frivolous' in order for it to be found to be without substantial justification." *Id.* (citing *Pierce*, 108 S. Ct. at 2251). In *Heath II*, the Court held that the county

council acted without substantial justification because “[t]he statute construed in [the case] was unambiguous, and coupled with the relevant precedent clearly established that the Council’s claims were without merit.” *Id.* at 184, 394 S.E.2d at 712. Therefore, the substantial justification standard in Section 15-77-300 requires a court to examine the established body of law in determining whether a state agency or political subdivision acted “without substantial justification” in pressing a claim. The holding in *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008), further clarifies “substantial justification” for the purposes of S.C. CODE ANN. § 15-77-300:

Substantial justification for purposes of the state action statute means “justified to a degree that could satisfy a reasonable person.” *Heath v. County of Aiken*, 302 S.C. 178, 183, 394 S.E.2d 709, 712 (1990) (quoting *Pierce v. Underwood*, 487 U.S. 552, 564, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988)). Therefore, in deciding whether a state agency acted with substantial justification, the relevant question is whether the agency’s position in litigating the case had a reasonable basis in law and in fact. *McDowell v. S.C. Dept. of Soc. Servs.*, 304 S.C. 539, 542, 405 S.E.2d 830, 832 (1991). Although an agency’s loss on the merits does not create a presumption that its position was not substantially justified, *Video Gaming Consultants, Inc. v. S.C. Dept. of Revenue*, 358 S.C. 647, 650, 595 S.E.2d 890, 892 (Ct. App. 2004), **the substance and outcome of the matter litigated is nevertheless relevant to the determination of whether there was substantial justification in pressing a claim.** *Heath*, 302 S.C. at 183, 394 S.E.2d at 712.

Layman v. State, 376 S.C. 434, 445, 658 S.E.2d 320, 325-26 (2008) (emphasis added). The substance of the Town’s case and the ruling on the evidence presented must be examined in determining whether the Town acted “without substantial justification.”

In the Request for Contested Case Hearing, Petitioners cited a number of state and federal statutes and regulations which the Department’s decision in this matter allegedly violated. The DHEC decision, which was challenged in this matter, was the grant of coverage to Roper Pond under the Construction General Permit. The Department’s decision was based on its review and approval of SWPPP prepared for the Proposed Project. However, at the hearing on the merits, Petitioners offered no evidence that the SWPPP approved by the Department was technically deficient. *Town of Arcadia Lakes v. S.C. Dep’t of Health & Envtl. Control and Roper Pond, LLC*, ALC Docket No. 09-ALJ-07-0069-CC, 2010 WL 6782535 (Jan. 21, 2010). The Court of Appeals affirmed this Court’s finding on that issue: “We also find significant the absence of any evidence from Appellants that the BMPs to be implemented under the SWPPP were inadequate to prevent

sediment from leaving the construction site.” *Town of Arcadia Lakes*, 404 S.C. at 530-31, 745 S.E.2d at 393 (Ct. App. 2013).

Additionally, since the nature of any deficiencies in the SWPPP would involve technical or specialized knowledge outside of the common knowledge and experience of a trier of fact, it would be expected that Petitioners would have offered an expert to assist the Court in assessing any alleged deficiencies. Rule 702, SCRE. Until Mr. McCall was conflicted out of this case, Petitioners claimed that he offered his expert opinion on these alleged deficiencies. Upon notifying the Town that he could not participate in this litigation, Mr. McCall offered to confer with Brian Bates and recommend other engineering experts to the Petitioners. However, no expert witness was offered for this purpose. Petitioners’ only expert witness offered in this matter admitted that he had not reviewed the SWPPP prepared on behalf of Roper Pond. Therefore, Petitioners failed to present evidence on DHEC’s alleged failure to satisfy the fundamental regulatory requirements on which its decision in this matter was based.

Additionally, Petitioners’ case-in-chief was focused almost exclusively on the dredging of the Pond; however, Petitioners’ expert at trial admitted at trial that he was not qualified to opine on this matter. Petitioners’ expert testified that he has no prior experience in assessing the potential impacts of excavation of a water body. Moreover, while Petitioners’ expert initially opined that the proposed excavation of the pond “will simply destroy the ecosystem that is now present,” he later withdrew that opinion because, as he stated, “I was trying to restrict myself to what I actually knew as opposed to my conjectures.” With respect to the testimony of Petitioners’ expert, the Court of Appeals stated as follows:

Although Reice admitted he previously opined that the proposed excavation of the Pond would have disastrous consequences, he now admitted this was only conjecture. Furthermore, Reice’s primary interest was sedimentation, and he admitted he had no direct experience with excavation. When asked if he believed the land-disturbing activities conducted in conjunction with Roper Pond Apartments would have an adverse impact on Roper Pond, Reice stated only that “[i]t doesn’t sound good” and he would “be surprised if they didn’t,” but declined to offer an expert opinion about the probable results. On cross-examination, Reice also stated he was not provided copies of Roper’s SWPPP and except for what he heard at the hearing, had no knowledge of the BMPs that Roper intended to follow in order to minimize the impact of its construction activities.

Town of Arcadia Lakes, 404 S.C. at 526, 745 S.E.2d at 391.

Instead of presenting evidence on alleged deficiency in the SWPPP, Petitioners argued that Roper Pond did not have the required federal permit for impacts resulting from excavation of the pond on the property. However, the federal law is clear and well-settled that a federal permit is required for excavation of a water body only when such activity is to be conducted in a “navigable water of the United States” under Section 10 of the Federal Rivers and Harbors Act, 33 U.S.C. §§ 401 *et seq.* (“Rivers and Harbors Act”). 33 U.S.C. § 403. This Court found that “Petitioners neither claimed nor presented any evidence that the Pond is a navigable water of the United States under Section 10 of the Rivers and Harbors Act.” *Town of Arcadia Lakes v. S.C. Dep’t of Health & Envtl. Control and Roper Pond, LLC*, ALC Docket No. 09-ALJ-07-0069-CC, 2010 WL 6782535, *19 (Jan. 21, 2010). Moreover, Petitioners failed to identify any other federal or state law which required a permit for excavation of the Pond. Instead, Petitioners claimed that a federal permit for excavation of the Pond, which was not required under federal law, was nonetheless required as a general condition of the 401 water quality certification for the Nationwide Permits. Specifically, Petitioners argued that there was no valid Nationwide Permit for filling the 0.075 acres of wetlands because the 401 water quality certification issued in 2007 for Nationwide Permits, including NWP 29, included a general condition for consideration of the “overall project proposed or accomplished by a single owner/developer” for any activities covered by a Nationwide Permit. That argument was rejected by this Court. *Town of Arcadia Lakes v. S.C. Dep’t of Health & Envtl. Control and Roper Pond, LLC*, ALC Docket No. 09-ALJ-07-0069-CC, 2010 WL 6782535, *16 (Jan. 21, 2010). Additionally, the Court of Appeals found this general condition to be inapplicable because there was no contention that the excavation of the pond “would result in a discharge into a navigable water.” *Town of Arcadia Lakes*, 404 S.C. at 534, 745 S.E.2d at 395. Moreover, in their Proposed Order submitted to this Court, Petitioners failed to cite to any legal authority supporting this argument.

Petitioners’ failure to cite relevant case law or other legal authority for their claims supports a demonstration of “without substantial justification.” Although Petitioners’ claims might be characterized as novel, the fact that a political subdivision of the State has raised novel issues in an action does not mean that the political subdivision was substantially justified in bringing such action. *Cornelius v. Oconee County*, 369 S.C. 531, 539-40, 633 S.E.2d 492, 497 (2006) (finding that citizen who initiated declaratory judgment action against a county was entitled to attorneys’ fees because the fact that novel issues were raised does not mean the county

was substantially justified in opposing the citizen in the declaratory judgment action). The substantial justification standard under Section 15-77-300 requires more than a plausible legal theory on which to bring the contested case. In *Cornelius*, the Supreme Court upheld the award of attorney fees in a declaratory judgment action brought by a county citizen against the county for a wastewater treatment facility funding scheme which violated a county referendum. The county argued that the award of attorney fees under Section 15-77-300 was improper because, *inter alia*, the county “acted with ‘substantial justification’ because there are no preexisting judicial precedents on these issues, merely attorney general opinions.” *Id.* at 538-39, 633 S.E.2d at 496. In upholding the award of attorney fees, the Supreme Court held:

The trial court can award attorneys’ fees under the statute only if it finds the State “agency acted without substantial justification in pressing its claim. . . .” § 15-77-300(1). An agency acts with “substantial justification” within the meaning of the statute when its position has a “reasonable basis in law and fact.” *McDowell v. SCDSS*, 304 S.C. 539, 542, 405 S.E.2d 830, 832 (1991). Contrary to County’s contention, **the fact that novel issues were raised does not mean County was substantially justified in opposing Cornelius**. Declaratory judgment actions by their very nature often present novel questions. *See, e.g. Eargle, supra* (authority of county administrator to suspend elected official’s employees); *United Oil Marketers, supra* (constitutionality of license tax incentive statute for gas/ethanol blend); *Heath v. County of Aiken*, 302 S.C. 178, 394 S.E.2d 709 (1990) (to define relationship between sheriff’s office and county council). Moreover, **County cited no viable authority supporting its position that it was no longer bound by the Referendum’s terms**. We agree with the circuit court that County acted without substantial justification, and no special circumstances render the attorneys’ fee award unjust.

Id. at 539-40, 633 S.E.2d at 496-97 (emphasis added). As such, the fact that there were no prior rulings directly on point as to the claims raised by the county did not preclude a finding that the county acted without substantial justification. Such is the case here. Petitioners advanced a legal theory for which there was no precedential basis in federal or state law. Moreover, despite the wealth of case law interpreting the Clean Water Act, the Rivers and Harbors Act, and the permitting programs established under those Acts, Petitioners continued to press their claim that a 401 Certification issued for a Nationwide Permit in 2007, two years prior to the DHEC decision at issue in this case, required the Department to consider the impacts of the excavation of Roper Pond. The Court of Appeals rejected all of Petitioners’ arguments regarding the sufficiency of the 401 certification and the alleged error in the Department’s failure to consider the impacts of the dredging of the Pond:

Appellants further argue the 401 certification issued by DHEC was insufficient to satisfy the requirements Roper needed to fulfill to obtain a 404 permit because: (1) the 401 certifications that DHEC issued for projects authorized under NWP 29 or NWP 39 could not apply to the excavation of the pond because that activity was not disclosed when Roper applied to the Corps for a 404 permit; (2) the project did not comply with certain general conditions applicable to all NWPs, specifically that DHEC consider the impacts to all land within a project boundary and to adjacent bodies of water or wetlands; (3) DHEC never issued a formal certification that the project met the conditions under NWP 29 for water quality certification; and (4) DHEC failed to conduct the required review for compliance with certain water quality regulations. We hold none of these allegations warrant reversal of the ALC's finding that Roper had an effective 401 certification for its proposed project.

Town of Arcadia Lakes, 404 S.C. at 533-34, 745 S.E.2d at 395. The Court of Appeals also affirmed this Court's ruling that a 404 permit was not required for coverage under the Construction General Permit:

Finally, Appellants take issue with the finding that Roper was entitled to coverage under the State General Permit. They submit two arguments in support of their position. We reject both arguments.

First, Appellants reiterate their previous argument that Roper was not entitled to coverage because the 401 certification was inadequate for a 404 permit, which in turn was a prerequisite for coverage under the State General Permit. We have already determined that the 401 certification that DHEC issued was sufficient for Roper to obtain coverage under NWP 29.

Appellants further contend that the excavation of the pond and lowering of its surface would make the pond a water control structure and would therefore require, under the terms of the State General Permit, a 404 permit from the Corps, which in turn would require a 401 certification. The ALC did not specifically address the question of whether the use of the pond as a water control structure required a 404 permit, and Appellants did not request a ruling in their motion to reconsider. The issue, then, has not been preserved for appellate review, and it would be improper for us to address it now. See *Shealy v. Aiken Cnty.*, 341 S.C. 448, 460, 535 S.E.2d 438, 444-45 (2000) (holding an issue was not preserved for appeal because the trial judge's general ruling was insufficient to preserve the specific issue for appellate review and the appellant did not move to alter or amend the judgment pursuant to Rule 59(e), SCRCP); *Hendrix v. Eastern Distribution, Inc.*, 320 S.C. 218, 218, 464 S.E.2d 112, 113 (1995) (vacating an opinion by this court "to the extent it addressed an issue which was not preserved").

Id. at 536, 745 S.E.2d at 396. Petitioners' presentation of novel legal theories in an attempt to create a 404 permitting requirement where none existed in the well-settled and substantial body

of law was rejected by this Court and the Court of Appeals. Therefore, despite Petitioner's novel legal theories, the Town acted without substantial justification in bring this action.

The Town argues that there was substantial justification to bring this action because "the Town's decision to file the request for contested case hearing was made solely and completely on reliance of the advice of counsel." This argument suggests a showing of "substantial justification" would only require a party to overcome the frivolous filing standard under Rule 11, SCRCP, or the Frivolous Civil Proceedings Sanctions Act, S.C. CODE ANN. § 15-36-10 et seq. ("FCPSA"). *Father v. South Carolina Dep't of Soc. Servs.*, 345 S.C. 57, 72, 545 S.E.2d 523, 531 (Ct. App. 2001) (finding the standard for sanctions under Rule 11 to be essentially the same as that under the FCPSA). The South Carolina Supreme Court has expressly held that a finding of "without substantial justification" does not require a showing that the claims asserted were frivolous. *Heath II*, 302 S.C. at 183, 394 S.E.2d at 712 (holding that "a court need not go so far as to brand a claim 'frivolous' in order for it to be found to be without substantial justification"). As such, a party's reliance on legal advice that it has claims which can be expected to survive a motion for sanctions under Rule 11, SCRCP, or the FCPSA does not shield a party from a finding of "without substantial justification" under Section 15-77-300.

Additionally, if reliance on the advice of counsel were a shield against a finding of "without substantial justification," Section 15-77-300 would be rendered meaningless. The South Carolina appellate courts have upheld a number of lower court findings that a state agency or political subdivision acted "without substantial justification" under Section 15-77-300, and in every reported case, the state agency or political subdivision was represented by counsel. See *Layman v. State*, 376 S.C. 434, 445, 658 S.E.2d 320, 325-26 (2008) (upholding award of attorney fees in class action by state retirees against the State and the South Carolina Retirement System); *Cornelius v. Oconee County*, 369 S.C. 531, 539-40, 633 S.E.2d 492, 497 (2006) (upholding award of attorney fees to citizen who brought declaratory judgment action against the county); *Tennis v. S.C. Dep't of Soc. Servs.*, 355 S.C. 551, 559-60, 585 S.E.2d 312, 317 (Ct. App. 2003) (reversing the denial of attorney fees in daycare operator action against DSS); *Brown v. City of North Charleston*, 314 S.C. 298, 301, 442 S.E.2d 633, 635 (Ct. App. 1994) (reversing trial court's denial of attorney fees for citizen seeking displacement and relocation costs from the city); *Heath II*, 302 S.C. at 183-84, 394 S.E.2d at 712 (upholding award of attorney fees in declaratory judgment action brought by sheriff against the county). The reliance on the advice of

counsel therefore does not preclude a finding that a state agency or political subdivision of the state acted without substantial justification. Additionally, as discussed below, the Supreme Court has recently addressed reliance on legal counsel in the context of an award of attorneys' fees and costs under Section 15-77-300; however, the Supreme Court addressed this argument under the "special circumstances" element of Section 15-77-300—not the determination of "without substantial justification."

The Town further argues that its claims were justified because "if the Supreme Court believed that the case was frivolous or without merit it would not have exercised its discretion and requested briefing and oral arguments." There is no basis for this contention. The Supreme Court regularly grants certiorari to review a decision of the Court of Appeals and then subsequently dismisses the petition for writ of certiorari as improvidently granted following oral arguments. *See, e.g., York County v. South Carolina Dep't of Health and Envtl. Control*, 408 S.C. 180, 758 S.E.2d 187 (2014) (dismissing writ of certiorari as improvidently granted following May 6, 2014 oral argument); *State v. Scott*, 413 S.C. 24, 773 S.E.2d 912 (2015) (missing writ of certiorari as improvidently granted following April 22, 2015 oral argument); *Estate of Atn Burns Livingston v. Livingston*, 412 S.C. 610, 773 S.E.2d 579, 580 (2015) (dismissing writ of certiorari as improvidently granted following May 5, 2015 oral argument). As such, the fact that the Supreme Court granted the petition for writ of certiorari in this matter cannot be construed as the Supreme Court's "clear acknowledgment of the meritorious claims" as the Town contends. The Town improperly interprets the Supreme Court's decision to grant its writ of certiorari as a statement on the merits of the claims at issue.

The Town acted without substantial justification in bringing this action because the Town lacked standing to bring the action. "[S]tanding is a fundamental prerequisite for instituting a legal action..." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 81, 753 S.E.2d 846, 853 (2014). Affirming this Court's Final Order and Decision, the Court of Appeals found that the Town lacked standing because the Town failed to present evidence to show that any of its "professed interests" would result in an injury in fact to the Town or that any alleged injuries "are 'fairly traceable' to the challenged action in this case." *Town of Arcadia Lakes*, 404 S.C. at 531, 745 S.E.2d at 393 (Ct. App. 2013). There is an inherent absence of "substantial justification" for an action where the Town failed to present evidence to establish

standing to challenge the DHEC decision at issue. The Court thus finds that the Town's lack of standing further supports the finding that the Town acted without substantial justification

The Town acted without substantial justification because the Town's primary objective in appealing the Department's decision in this matter was not to challenge the Department's decision to grant Roper Pond coverage under the Construction General Permit, but to stop or delay the construction of an apartment complex on the Roper Pond property. Roper Pond offers the testimony and correspondence of Mr. Thomas, mayor and Rule 30(b)(6) deponent for the Town, as evidence of this intent to stop or delay the Proposed Project. Mr. Thomas testified that there was no opposition to the previous plan to construct condominiums on the Roper Pond property. In an August 23, 2008 email, Mr. Thomas wrote that "the town was misled and deceived in the initial meetings 3+ years ago" by the developer to gain support for rezoning of the Roper Pond property. Mr. Thomas further wrote:

The town should use all necessary means to go before the Richland County Planning Commission and appeal the August 21 Planning Committee recommendation (on numerous reasons of environmental impact, faulty traffic studies and NPDES requirements that have not been studied or met concerning flood control) and to resend [sic] the past zoning change on the grounds of misrepresentation and breach of verbal contract.

Mr. Thomas acknowledged that the Town opposed the planned development of the property for reasons which had nothing to do with the Department's approval of the SWPPP and authorization under the Construction General Permit. Moreover, Mr. Thomas admitted that the Town had no independent knowledge of facts supporting its appeal of the Department's grant of coverage to Roper Pond under the Construction General Permit.

Upon receipt of the December 15, 2008 DHEC decision at issue in this case, Mr. Thomas sent an email to Brian Bates stating that the Town could "send in a blanket appeal to the DHEC Board and delay the actual decision for 60 days." At the close of this email, Mr. Thomas wrote: "Let me know where you think we can go to delay and/or stop this project." The stated objective of this email is further evidenced by the Town's efforts to oppose governmental authorization for the planned development at every opportunity. For example, Mr. Thomas contacted a politician and others to assist the Town in holding up South Carolina Department of Transportation approval for the Proposed Project. Additionally, at its October 2, 2008 council meeting, the Town adopted a resolution to the Richland County Planning Commission regarding development plans

submitted to the County for the Proposed Project. The resolution advised the Commission of the Town's belief that the proposed development, multifamily high density apartments, was "out of character and totally incongruous for the entire town, its neighborhoods, contiguous community and the intended zoning use as originally presented." The resolution further requested that "an economic impact study be performed to determine the loss of property value to the homes in the adjacent Kaminer Station Subdivision, and homes directly affected across Trenholm Road and by adjacent nearby lakes, due to the proposed 204 apartments . . ." This evidence supports Roper Pond's contention that the Town engaged in an comprehensive effort to delay or stop the Proposed Project.

Similarly, Roper Pond argues that meeting with DHEC and governmental authorities were intended to obstruct the development of the Proposed Project and were not intended to facilitate the correction of deficiencies in the SWPPP prepared by B.P. Barber on behalf of Roper Pond. The Town supported the exclusion of B.P. Barber from a meeting with Senator Joel Lourie as a strategy for further delaying the approval of the SWPPP. Brian Bates and Daniel Hill, the professional engineers assisting the Town in its opposition to the Department's approval of the SWPPP, attended a meeting with Senator Lourie on behalf of the Town. The email correspondence regarding this meeting demonstrates the Mr. Thomas agreed with and promoted Mr. Bates' recommendation that B.P. Barber be excluded from the meeting. In a November 6, 2008 email, Mr. Bates advised Mr. Thomas as follows:

Yes I can attend a meeting at that time. As for your phone message about BP Barber, I don't care if they are there, but letting them know our position on their design (assuming we find flaws) that quickly will just expedite their response. I would think that every day that this thing is not resolved is another day it isn't being built. Going through the system is a more formal, civil, and slower method in my opinion. I would rather them keep guessing what our next move is instead of confronting them. Just my thoughts.

Upon receipt of the following email message, Mr. Thomas responded: "I agree with you . . . I will let Joel know that You Danny and I can be there." (ellipses in original). Mr. Thomas thereafter forwarded the email to Senator Lourie with his endorsement of the proposed strategy. This evidence supports Roper Pond's claim that the Town's "concerns" about the SWPPP were merely another avenue in to determine "where you think we can go to delay and/or stop this project."

With respect to the Town's concerns regarding the SWPPP for the Proposed Project, the Town was afforded numerous opportunities to raise those concerns prior to the Department's

decision to grant Roper Pond coverage under the Construction General Permit. The Town provided comments to the Department shortly after the Department staff took over the review of the SWPPP. In an October 29, 2008 email, Mr. Thomas forwarded the Department's review letter for the SWPPP to Mr. Bates and requested that Mr. Bates advise him "if we in Arcadia Lakes need to ask for more." Mr. Bates advised Mr. Thomas to "wait until they try to address this and then bring up the interpretation that this water must be segregated from all of the other runoff." Mr. Thomas responded: "Thanks again for your continued expertise in this matter." This email exchange demonstrates that the Town was raising technical issues to the Department staff, and the Department staff was adequately addressing those issues. Additionally, it shows that the Town's real objective in raising these issues was not to ensure that the SWPPP was technically sufficient to control the stormwater runoff on the property, but to identify potential obstacles to the development of the property. As evidenced by Mr. Thomas's email of December 17, 2008, the Town intended to appeal that decision even if there were no grounds for such appeal. At the hearing on the merits, the Town failed to offer any evidence of a technical deficiency in the SWPPP. The evidence of the Town's efforts to delay or stop the Proposed Project further supports this Court's finding that the Town acted "without substantial justification" in bringing this contested case.

C. Special Circumstances

The Town fails to identify any special circumstances that would make an award under Section 15-77-300 unjust. However, the reliance on advice of counsel has been advanced as a special circumstance in a Section 15-77-300 ruling. In the recent decision in *McNaughton v. Charleston Charter School for Math and Science, Inc.*, 411 S.C. 249, 768 S.E.2d 389 (2015), the Supreme Court addressed the defendant school's reliance on the advice of legal counsel in the context of an award of attorney fees under Section 15-77-300. The Supreme Court affirmed the trial court's verdict in favor of McNaughton on her breach of contract claim against the school and award of attorney fees under Section 15-77-300. On appeal, the school argued that the award of attorney fees was unjust because the principal had received the advice of counsel in making a decision prior to terminating McNaughton. The Supreme Court upheld the circuit court's ruling which rejected this argument:

Appellant also argues that special circumstances exist rendering the award of attorney's fees unjust. *See* S.C. Code Ann. § 15-77-300(B)(2). In particular,

Appellant relies on the fact that the principal solicited legal advice before terminating McNaughton's employment to ensure that the existence of the contingency clause in her employment agreement did not have legal significance. Appellant also cites the contingency clause itself, its students' math scores, and the letter of recommendation provided to McNaughton as special circumstances making attorney's fees unjust. Appellant contends that because its decision to terminate McNaughton's employment was made in good faith and in pursuit of its students' best interests, the trial court should not have awarded attorney's fees.

The trial court rejected these arguments, and found that no special circumstances existed to make an award of attorney's fees unjust in this case. We find the trial court did not abuse its discretion in making this finding, but instead, carefully considered and applied each of the applicable factors in the statute. See Layman, 376 S.C. at 444, 658 S.E.2d at 325. Accordingly, we affirm the trial court's decision to award McNaughton's attorney's fees under section 15-77-300.

Id. at 267-68, 768 S.E.2d at 399. The Town thus cannot rely on the advice of counsel to shield it from an award of attorneys' fees and costs under Section 15-77-300. There are no special circumstances which would make an award of attorneys' fees and costs unjust. The Court thus finds that Roper Pond is entitled to an award of attorneys' fees and costs pursuant to Section 15-77-300 of the State Action Statute.

II. SANCTIONS PURSUANT TO SCALC RULE 72

Roper Pond seeks sanctions against the Town pursuant to SCALC Rule 72, for the costs of delay of the Proposed Project during the pendency of the automatic stay before this Court. Roper Pond asserts that the Town's primary objective in appealing the Department's decision in this matter was not to challenge the technical sufficiency of the SWPPP, but to stop or delay the construction of an apartment complex on the Roper Pond property. As discussed above, Roper Pond cites to the numerous communications between the Town's mayor and the engineers who assisted the Town during DHEC's review of Roper Pond's SWPPP. In a December 17, 2008 email regarding the appeal of the Department's decision on the State Construction General Permit coverage for Roper Pond, Mr. Thomas wrote: "Let me know where you think we can go to delay and/or stop this project." A December 30, 2009 draft of the request for Board review raised issues regarding the Proposed Project, but did not identify any defect in the Department's grant of coverage under the Construction General Permit.

The Town acknowledges that "the Town wanted to slow the process," but disputes that its actions were "solely for the purpose of delay." The evidence on the record demonstrates that the Town opposed the development of the property as an apartment complex. The Town argues that

the request for contested case hearing was not filed solely for the purpose of delay because the Town had other concerns about the proposed development. The Town claims that the contested case was not brought “solely for the purpose of delay” because there were numerous concerns about zoning, compliance with the county land development ordinance, maintaining the character of the Town, diminution in property values in the Town, and faulty traffic impact studies. However, none of these alleged concerns relate to the DHEC decision at issue in this contested case. Moreover, these concerns should be addressed through local zoning and land use authorities. However, the Roper Pond Property is outside of the corporate limits of the Town, Richland County—not the Town—has jurisdiction over zoning and land use issues affecting the Property. The Court thus finds that the Town availed itself of the appeal process authorized under S.C. CODE ANN. § 44-1-60 and the Administrative Procedures Act, S.C. CODE ANN. §§ 1-23-10 *et seq.* (“APA”) in order to redress claims which are properly addressed by and through Richland County zoning and land use authorities.

Additionally, Roper Pond has presented evidence of numerous communications in which the Town’s mayor and those acted on the Town’s behalf admit that Petitioners were challenging the DHEC decision to issue coverage under the General Permit as a means to stop or delay the proposed development. The fundamental regulatory issue in the DHEC decision at issue in this case was the technical sufficiency of the SWPP submitted to DHEC in support of Roper Pond’s request for coverage under the General Permit. However, as this Court and the Court of Appeals held, Petitioners failed to present any evidence regarding any alleged deficiencies in the SWPPP, and neither Petitioner’s expert nor any of the Petitioners even reviewed the SWPPP. *Town of Arcadia Lakes* 404 S.C. at 527-33, 745 S.E.2d at 391-94 (Ct. App. 2013). Moreover, with respect to the Town’s concerns regarding the SWPPP for the Proposed Project, the Town was afforded numerous opportunities to raise those concerns prior to the Department’s decision to grant Roper Pond coverage under the Construction General Permit. Prior to a November 14, 2008 meeting with the Department staff at Senator Lourie’s office, the Town and its technical advisors had reviewed the SWPPP and provided comments to the Department staff, which the staff unquestionably addressed. In an October 2, 2008 email, Mr. Thomas advised Mr. Bates as follows:

Thank you again . . . wish us luck Monday . . . Joel has received a copy of a letter DEHEC sent to the developer telling him that they had pulled the developer’s application and want him to provide all documentation for additional review. Is

the first flush requirements a possible application killer that would require them to reapply. If we could get to that point, we may have [a] chance to get them under the new rules if they approved before they have a chance to reapply. . . RT

It is apparent that the Town provided comments to the Department shortly after the Department staff took over the review of the SWPPP. In an October 29, 2008 email, Mr. Thomas forwarded the Department's review letter for the SWPPP to Brian Bates and requested that Mr. Bates advise him "if we in Arcadia Lakes need to ask for more." Mr. Bates advised Mr. Thomas as follows:

Told you that "waters of the state for water quality" thing had teeth. They now have to show how they are going to collect, and hold for 24 hours, the first inch of runoff from the entire site, which will be approximately 36,000 cubic feet or 271,000 gallons. For visualization purposes, that would be a pond (like the one that was built for those 4 or 5 lots down Trenholm Road) that would be 3-ft. deep and 110-ft. X 110-ft. square or about the volume of the Rockbridge Club swimming pool. To account for that outside of the wetlands boundary, they are going to have to significantly revise the site plans.

I suggest we wait until they try to address this and then bring up the interpretation that this water must be segregated from all of the other runoff. To do that on dense site is an impractical endeavor at best and not usually required due to its complexity. However, a strict interpretation of the regulations indicates that it is required. (emphasis added).

Mr. Thomas responded: "Thanks again for your continued expertise in this matter." This email exchanges demonstrates that the Town was raising technical issues to the Department staff, and the Department staff was adequately addressing those issues. Additionally, it demonstrates that the Town's real objective in raising these issues was not to ensure that the SWPPP was technically sufficient to control the stormwater runoff on the property, but to identify potential obstacles to the development of the property. Otherwise, there would be no suggestion that "we wait until they try to address this and then bring up the interpretation that this water must be segregated from all of the other runoff." Petitioners offered no evidence at the hearing that the concerns raised by the Town and other Petitioners were not fully considered by the Department staff and addressed by Roper Pond's consultant prior to the Department's final decision.

The Town argues that in denying Roper Pond's motion for costs under Rule 222, SCACR, "the Supreme Court implicitly concluded that dismissal on mootness grounds is not a favorable disposition and, after a thorough review of the record, found nothing untoward or evidencing that the case was brought solely for delay such that costs would be warranted." The Town reads too much into the single sentence denying the motion for costs under Rule 222, SCACR. This is

particularly true as it relates to Roper Town's petition for sanctions under SCALC Rule 72. The Supreme Court's Order denying the motion reads as follows: "The Motion for Costs filed on behalf of respondent, Roper Pond, LLC, in the above entitled matter is denied." A review of the record would not provide the Supreme Court with the evidence supporting Roper Pond's claim that the Town brought the contested case solely for the purpose of delay. The record on appeal before the Supreme Court did not include the Mayor's communications prior to bringing the contested case. Additionally, since Roper Pond's April 19, 2010 Petition for Fees, Costs, and Sanctions was held in abeyance during the pendency of the appeal, the parties did not argue this issue in its briefs or oral arguments before the Supreme Court. However, even if such communications were before the Supreme Court, there is no basis for reading the one-sentence order denying Roper Pond's motion for costs as a ruling on the Town's objectives in bringing this action.

The Town argues that sanctions are not warranted because the "appeals process also did nothing to delay the project, as the project went forward to completion regardless." This argument disregards the financial impacts of the substantial delay in the construction of the Proposed Project. The DHEC decision which was challenged in this contested case was issued to Roper Pond by letter dated December 15, 2008. This Court issued its Final Order and Decision on January 21, 2010. Petitioners thereafter filed a Motion to Reconsider and for Stay on February 16, 2010. The Court denied that Motion on April 1, 2010. As such, the DHEC decision was stayed for not less than thirteen months. Additionally, this delay required Roper Pond to re-apply for certain County permits which had expired during the pendency of the contested case and thus resulted in further delay. Accordingly, the Town cannot claim that there was there was no consequence to the delay in the construction of the Proposed Project during the pendency of this contested case.

Roper Pond claims substantial cost increases directly attributable to the delay of construction of the Proposed Project during the pendency of the contested case before this Court. Roper Pond has presented evidence to demonstrate that the Town availed itself of the contested case procedures established under S.C. CODE ANN. § 44-1-60 and the APA, S.C. CODE ANN. §§ 1-23-10 *et seq.*, for the purpose of stopping or delaying the Proposed Project. SCALC Rule 72, authorizes this Court to impose such sanctions "as the circumstances of the case and discouragement of like conduct in the future may require." SCALC Rule 72. The objective of

discouraging like conduct in the future is appropriately achieved by shifting some or all of the cost of the delay of the Proposed Project from Roper Pond to the Town. Otherwise, the Town has achieved its stated and improper objective of delaying the Proposed Project by preventing the commencement of construction for not less than thirteen months. Not only has such action unnecessarily expended valuable judicial resources, it has caused significant economic harm to Roper Pond. The Court therefore grants Roper Pond's Petition for sanctions for delay of the Proposed Project during the pendency of the stay before this Court.

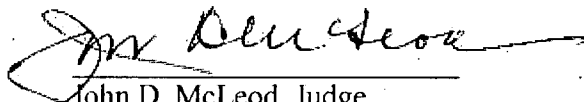
ORDER

IT IS HEREBY ORDERED that Roper Pond is entitled to an award of attorneys' fees and costs under S.C. CODE ANN. § 15-77-300.

IT IS FURTHER ORDERED that Roper Pond is entitled to sanctions against Petitioner Town of Arcadia Lakes for the delay in construction of the Proposed Project during the pendency of the stay before this Court.

AND IT IS SO ORDERED.

Columbia, S.C.
September 1, 2016



John D. McLeod, Judge
S.C. Administrative Law Court

CERTIFICATE OF SERVICE

I, Anthony R. Goldman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

September 1, 2016
Columbia, S.C.


Anthony R. Goldman
Judicial Law Clerk

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Town of Arcadia Lakes, Robert L. Jackson,
Linda Z. Jackson, Robert E. Williams, Barbara
S. Williams, Elizabeth M. Walker, Louis E.
Spradlin, Mary Helen Spradlin, Thomas Hutto
Utsey, Tony Sinclair, Aaron Small, Bette
Small, Gene F. Starr, M.D., Elaine J. Starr,
Sanford T. Marcus, Ruth L. Marcus, and
Steven Brown,

Petitioners,

vs.

South Carolina Department of Health and
Environmental Control and Roper Pond, LLC,

Respondents.

Docket No. 09-ALC-07-0069-CC

**ORDER GRANTING MOTION TO
STRIKE**

FILED

JAN 25 2016

SC ADMIN. LAW COURT

This matter comes before the Administrative Law Court ("ALC") on Respondent Roper Pond, LLC's Motion to Strike filed on September 10, 2015 ("September 10, 2015 Motion to Strike"). The September 10, 2015 Motion to Strike was filed contemporaneously with Roper Pond, LLC's ("Roper Pond") Reply to Petitioners' Response to Roper Pond, LLC's Petition for Attorneys' Fees and Costs and For Sanctions Pursuant to Rule 72, SCRPA LC ("Roper Pond's Reply"). Petitioners' Response to Roper Pond, LLC's Petition for Attorneys' Fees and Costs and For Sanctions Pursuant to Rule 72, SCRPA LC ("Petitioners' Response to Petition for Fees") was supported by the following affidavits: the Affidavit of Eugene C. McCall, Jr. ("McCall Affidavit"), the Affidavit of D. Cravens Ravenel ("Ravenel Affidavit"), and the Affidavit of John P. Freeman ("Freeman Affidavit") (collectively referred to as the "Affidavits"). Roper Pond moves to strike the Affidavits and to exclude the opinions therein. Roper Pond further moves to strike statements from the oral arguments before the Supreme Court, or in the alternative, to engage a court reporter to produce a full transcript of the oral arguments to be admitted into evidence. On November 24, 2015, this Court held a hearing on the Motion to Strike. On November 30, 2015, Roper Pond filed Respondent Roper Pond, LLC's Third Amended Petition for Attorneys' Fees and Costs and For Sanctions Pursuant to Rule 72, SCRPA LC ("Third Amended Petition for Fees"),

which limited Roper Pond's petition for attorneys' fees and costs to a request for an award against the Town pursuant to S.C. CODE ANN. § 15-77-300, and in the alternative, sanctions against the Town pursuant to Rule 72, SCRALC, on the grounds that the Town's challenge to the DHEC's decision in this matter was taken solely for the purpose of delay. On January 5, 2016, the Town filed its Response to Respondent Roper Pond, LLC's Third Amended petitioner for Fees, Costs, and Sanctions ("Town's Response to the Third Amended Petition for Fees"). The Town's Response to the Third Amended Petition for Fees was supported by the Affidavits, along with two additional new affidavits, the Affidavit of Amy E. Armstrong and the Affidavit of Charles Cook. On a conference call with the Court on January 13, 2016, Roper Pond moved to strike the same three Affidavits offered in support of the Town's Response to the Third Amended Petition for Fees ("January 13, 2016 Motion to Strike"), but not the Armstrong and Cook Affidavits. For the reasons set forth below, the Court grants Roper Pond's September 10, 2015 Motion to Strike and January 13, 2016 Motion to Strike.

BACKGROUND

Pursuant to S.C. CODE ANN. § 15-77-300, Roper Pond seeks an award of attorneys' fees and costs in this matter. Section 15-77-300 provides in relevant part as follows:

(A) In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:

(1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and

(2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

* * *

(C) The provisions of this section do not apply to civil actions relating to the establishment of public utility rates, disciplinary actions by state licensing boards, habeas corpus or post conviction relief actions, child support actions, except as otherwise provided for herein, and child abuse and neglect actions.

S.C. CODE ANN. § 15-77-300. In addition, or in the alternative, Roper Pond seeks an award of attorneys' fees and costs and the costs of the delay of the Proposed Project pursuant to Rule 72, SCRALC. Administrative Law Court Rule 72 provides that "[i]f the presiding administrative law

judge determines that a contested case, appeal, motion, or defense is frivolous or taken solely for purposes of delay, the judge may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require.” Rule 72, SCALCR. On November 30, 2015, Roper Pond filed its Third Amended Petition for Fees, which limited Roper Pond’s petition for attorneys’ fees and costs to a request for an award against the Town pursuant to S.C. CODE ANN. § 15-77-300, and in the alternative, sanctions against the Town pursuant to Rule 72, SCRALC, on the grounds that the Town’s challenge to the DHEC’s decision in this matter was taken solely for the purpose of delay. Roper Pond withdrew all claims for sanctions against the individual Petitioners and withdrew any argument that Roper Pond is entitled to sanctions against the Town pursuant to Rule 72, SCRPALC, because the contested case was frivolous.

LEGAL STANDARD

The admissibility of an expert’s testimony is within the trial judge’s sound discretion. *Payton v. Kearse*, 329 S.C. 51, 495 S.E.2d 205 (1998). “A motion to strike is likewise within the trial court’s discretion and will not be reversed absent an abuse of discretion.” *Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 143, 697 S.E.2d 644, 653 (Ct. App. 2010) (citing *Mayes v. Paxton*, 313 S.C. 109, 115, 437 S.E.2d 66, 70 (1993)). Rule 702, which governs the admissibility of expert testimony, provides as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

S.C.R. Evid. 702. (Emphasis added). “In general, expert testimony **on issues of law** is inadmissible.” *Dawkins v. Fields*, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003) (citations omitted) (emphasis in original). A court may properly refuse to consider an expert affidavit which “primarily contain[s] legal arguments and conclusions.” *Id.* at 65, 580 S.E.2d at 437. A trial court’s refusal to consider an expert affidavit containing legal arguments and conclusions is appropriate even when the affiant “arguably offered some helpful, factual information.” *Id.* at 66-67, 580 S.E.2d at 437.

DISCUSSION

I. Freeman Affidavit

Petitioners offer Professor Freeman as “an expert in legal malpractice and professional responsibility whose expert opinion have been frequently used by courts across this state.”

(Petitioners' Response to Petition for Fees, p. 2). Roper Pond moves to strike the Freeman Affidavit on the basis that Professor Freeman offers opinions which are legal conclusion to be determined by the Court upon review of the evidence presented in this matter. (September 10, 2015 Motion to Strike, p. 3). Additionally, Roper Pond contends that Professor Freeman has no "scientific, technical, or other specialized knowledge" to assist the Court to understand the evidence or to determine a fact at issue in the matters before this Court. (September 10, 2015 Motion to Strike, p. 5). Finally, Roper Pond argues that a showing of attorney misconduct is not asserted in this case, and therefore, Professor Freeman's opinions regarding whether counsel for Petitioners met the "reasonable attorney" standard is not relevant to the determinations to be made in ruling on Roper Pond's Petition for Fees. (September 10, 2015 Motion to Strike, p. 5).

In his Affidavit, Professor Freeman testifies that his opinion is based on information gleaned from the following sources and a review of the applicable law and court rules: "Besides repeatedly consulting with counsel for the Town and the Resident, I have been furnished and have reviewed the fee petition and more than 700 pages of record material starting with the Request for Contested Case Hearing filed February 16, 2009." (Freeman Affidavit, ¶ 3). The Freeman Affidavit includes the following opinions in support of Petitioners' Response to Roper Pond's Petition for Fees:

5. Even if the Supreme Court had rendered a favorable opinion on the main issues, I do not agree that the Town acted without substantial justification. Nor do I agree with Roper Pond's claim that the Town or Residents litigated in bad faith. Specifically, I disagree with Roper Pond's claim that the "[t]here is no doubt that the Petitioners' appeal of the Department's decision in this matter 'frivolous or taken solely for the purposes of delay.'" Roper Pond's Memorandum in Support at 35. Roper Pond provides no evidence for its bald claim that the case is frivolous and brought solely for delay, and after a thorough review of the relevant filings I have found no support for this claim of unprofessional conduct.
6. In the same vein, I do not agree with Roper Pond "that Petitioners knew or should have known that there was no reasonable legal basis for its challenge to the Department's Decision," and Roper Pond again provides no evidence to support this statement. *Id.* at 34. In summary, I not agree that Roper Pond has been subjected to lawyer misconduct in the form of a frivolous or bad faith proceeding filed and maintained against it by its lawyers. Although the Town and Residents did not ultimately obtain the relief sought in this case, in my professional opinion it was brought with substantial justification and was not frivolous, brought in bad faith or brought solely for the purposes of delay. My opinion is that the litigation

was brought and maintained in good faith, but the reviewing court simply could not provide the relief required because construction had been completed. My opinion is that sanctions are not called for and would be inappropriate. Reasons supporting my opinions follow.

* * *

19. Accepting that the test for sanctions is “frivolity” and/or bad faith, I testify that the test has not been met here, in that, in light of all relevant facts: (1) reasonable attorneys after reasonable investigation would (and did) believe that the Residents and Town’s position was meritorious and that there was good cause for bringing it; (2) a reasonable attorney would (and did) believe that the claims had not been raised in bad faith or merely to harass or injure Roper Pond; and (3) a reasonable attorney would (and did) believe that the claim was not frivolous and has not been raised for an ulterior motive. I state affirmatively that, in my opinion held to a reasonable degree of professional certainty, based on my investigation, including my review of the materials listed above, Roper Pond has no hope of proving frivolity or bad faith or lack substantial justification by a preponderance of the evidence.

(Freeman Affidavit, ¶¶ 5, 6, and 19). In offering these opinions, Professor Freeman cites to no facts outside of the record in this matter. Moreover, except for the McCall Affidavit and the Ravenel Affidavit, Professor Freeman cites to no documents outside of the record. Professor Freeman cites to select portions of the record, the McCall Affidavit, and the Ravenel Affidavit to opine on how this Court should rule on Roper Pond’s Petition for Fees. Pursuant to the South Carolina Supreme Court holding in *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003), the expert opinions offered by Professor Freeman are legal opinions on the ultimate issue before this Court and therefore inadmissible.

In *Dawkins*, the trial court refused to consider Professor Freeman’s expert affidavit offered in opposition to defendants’ motion for summary judgment. In upholding the trial court’s refusal to consider the affidavit, the Supreme Court found that “Professor Freeman’s affidavit inappropriately attempted to usurp the trial court’s role in determining whether petitioners were entitled to summary judgment.” *Id.* at 65, 580 S.E.2d at 437 (citation omitted). The holding in *Dawkins* provides as follows:

Rule 702, SCRE, provides that “[i]f . . . specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” While it is true that “an opinion . . . is not objectionable because it embraces an ultimate issue to be decided by the

trier of fact,” Rule 704, SCRE, Professor Freeman’s affidavit inappropriately attempted to usurp the trial court’s role in determining whether petitioners were entitled to summary judgment. *See O’Quinn v. Beach Assocs.*, 272 S.C. 95, 106-07, 249 S.E.2d 734, 739-40 (1978) (where expert testimony was offered to establish a conclusion of law, the Court held that the trial court properly excluded the testimony because that was within the exclusive province of the trial court).

In general, expert testimony on issues of law is inadmissible. *See generally* Note, *Expert Legal Testimony*, 97 Harv. L. Rev. 797, 797 (1984); *see also Askanase v. Fatjo*, 130 F.3d 657, 673 (5th Cir.1997) (where the court disallowed a legal expert’s opinion on whether corporate officers and directors breached their fiduciary duties because “[s]uch testimony is a legal opinion and inadmissible.”); *United States v. Sinclair*, 74 F.3d 753, 758 n. 1 (7th Cir.1996) (commenting that Federal Rules of Evidence 702 and 704 prohibit experts from offering opinions about legal issues that will determine the outcome of a case).

Recently, this Court decided the issue of whether expert testimony from a criminal defense attorney on whether trial counsel was deficient could be admitted at a post-conviction relief (PCR) hearing. *Green v. State*, 351 S.C. 184, 198, 569 S.E.2d 318, 325 (2002). *Green* argued that Rule 702 required the PCR judge to admit the expert opinion testimony. We disagreed, and stated the following:

The expert offered no factual evidence. He proffered his opinion, assuming certain facts, [that] trial counsel’s actions fell below acceptable legal standards of competence. **The testimony was not designed to assist the PCR court to understand certain facts, but, rather, was legal argument why the PCR court should rule, as a matter of law, trial counsel’s actions fell below an acceptable legal standard of competence.** Such “testimony” falls outside of Rule 702, SCRE.

Id. (emphasis added).

Green is instructive to the instant case. Here, Professor Freeman’s affidavit reads as if it could have been respondents’ oral argument to the trial court at the summary judgment hearing. Although Professor Freeman arguably offered some helpful, factual information,^{FN4} the overwhelming majority of the affidavit is simply legal argument as to why summary judgment should be denied. For that reason, we hold the trial court correctly refused to consider it, and the Court of Appeals erred in finding otherwise. *See Green, supra; O’Quinn, supra.*

FN4. For instance, Professor Freeman offered his opinion that based on the value of the south side tract, Seaside’s stock value per share was approximately \$800, and therefore, selling the stock for \$100 per share was improper.

Dawkins v. Fields, 354 S.C. 58, 65-67, 580 S.E.2d 433, 437 (2003) (emphasis in original). The

Supreme Court held the trial court properly refused to consider Professor Freeman's affidavit because "the overwhelming majority of the affidavit is simply legal argument as to why summary judgment should be denied" *Id.* at 66-67, 580 S.E.2d at 437 (footnote omitted). Such is the case here. Professor Freeman offers no "helpful, factual information." Professor Freeman does not offer any factual basis for his opinions outside of the record and the affidavits of Mr. McCall and Mr. Ravenel. Professor Freeman merely reviews the record in this case and opines on how he would apply the law. Accordingly, the Freeman Affidavit inappropriately attempts to usurp this Court's role in determining whether Roper Pond is entitled the relief sought in its Petition for Fees.

Petitioners assert that "a simple search reveals a host of cases where Professor Freeman has offered expert opinions and conclusions equivalent to those in this challenged affidavit." (Petitioners' Response to Motion to Strike, p. 6). However, the cases cited by Petitioners in support of this argument have no application to the matters before this Court on Roper Pond's Petition for Fees. Petitioners cite to a number of legal malpractice cases in which the court considered the expert testimony of Professor Freeman. (See Petitioners' Response to Motion to Strike, pp. 6-8 (citing *Hatfield v. Van Epps*, 358 S.C. 185, 594 S.E.2d 526 (Ct. App. 2008); *Holmes v. Haynsworth, Sinkler & Boyd, PA*, 408 S.C. 620, 760 S.E.2d 399 (2014); *Tuten v. Joel*, 2014 WL 4212684 (S.C. Ct. App. Aug. 27, 2014); *Brandt v. Gooding*, 368 S.C. 618, 630 S.E.2d 259 (2006)). The admissibility of Professor Freeman's testimony in a legal malpractice case has no bearing on the admissibility in this case because a legal malpractice claim requires an expert. As the South Carolina Supreme Court explained in the *Holmes* decision:

With respect to a legal malpractice claim, a claimant must rely on expert testimony to "establish both the standard of care and the deviation by the defendant from such standard." *Gilliland v. Elmwood Props.*, 301 S.C. 295, 301, 391 S.E.2d 577, 580 (1990) (citation omitted); *Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 435, 472 S.E.2d 612, 613 (1996); *Hall v. Fedor*, 349 S.C. 169, 174, 561 S.E.2d 654, 657 (Ct.App.2002). In this regard, a claimant must establish, through expert testimony, the following:

- (1) the existence of an attorney-client relationship;
- (2) a breach of duty by the attorney;
- (3) damage to the client; and
- (4) proximate cause of the plaintiff's damages by the breach.

Hall, 349 S.C. at 174, 561 S.E.2d at 656.

Holmes, 760 S.E.2d at 407 (emphasis added). Accordingly, in a legal malpractice case, a courts'

consideration of the expert testimony from Professor Freeman is not a matter of whether such testimony is admissible under Rule 702 as a subject matter requiring “scientific, technical, or other specialized knowledge.” The South Carolina Supreme Court has held that expert testimony is required in a legal malpractice case.

Professor Freeman’s testimony in legal malpractice cases does not support admissibility of his expert testimony with respect to the Roper Pond’s petition against the Town for fees and costs under S.C. Code Ann. § 15-77-300 and for sanctions under Rule 72, SCRPA LC. Professor Freeman opined the Petitioners’ attorneys did not violate the “reasonable attorney” standard under S.C. CODE ANN. § 15-36-10 (Frivolous Civil Proceedings Sanctions Act). However, Roper Pond does not assert a claim for malpractice or misconduct of Petitioners’ attorneys and has amended its Petition for fees to expressly limit its request for an award an award of attorneys’ fees and costs against the Town under S.C. CODE ANN. § 15-77-300, and in the alternative, sanctions under Rule 72, SCRPA LC, against the Town for bringing the contested case “solely for the purpose of delay.” Therefore, the legal malpractice cases in which Professor Freeman’s expert testimony was admitted have no bearing on the admissibility of the Freeman Affidavit in this matter.

Similarly, Petitioners cite to the admissibility of Professor Freeman’s expert testimony in *Dehlinger v. U.S.*, 2012 WL 1719294 (D.S.C. May 16, 2012). That testimony was offered in support of a claim of ineffective assistance of counsel under the Sixth Amendment. Like the testimony in the legal malpractice cases, the admissibility of Professor Freeman’s testimony in *Dehlinger* does not support the Petitioners’ claim that his testimony is admissible in this case. Roper Pond’s Petition for Fees is based on the conduct of the Town--not its attorneys.

Petitioners also cite to the recent ruling by Judge Michelle Childs on an award of attorneys’ fees in a class action case under the Employee Retirement Income Security Act of 1974 (“ERISA”). Judge Child’s ruling in *Savani v. URS Professional Solutions, LLC*, 2014 WL 172503, (D.S.C. Jan. 15, 2014), involved the determination of reasonable of attorneys’ fees for an award under Section 1132 of ERISA, which provides for attorneys’ fees in an action on behalf of an employee benefits plan. The Court did not consider Professor Freeman’s opinion in determining whether plaintiffs’ counsel was entitled to the award of fees. Moreover, there is no indication in this ruling that Professor Freeman offered such opinion. In her ruling, Judge Childs considered Professor Freeman’s opinion of individual factors used for determining the reasonableness of the fees incurred by plaintiffs’ counsel. Specifically, Judge Childs cited to the Fourth Circuit holding

in to *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978):

Thus, in determining reasonableness, this court is to analyze the twelve (12) factors set forth in *Barber*: “(1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorney's fees awards in similar cases.” *Id.* at 226 n. 28.

Savani, 2014 WL 172503, *3 (emphasis added). Judge Childs considered Professor Freeman's opinions “in determining the reasonableness” of the attorneys' fees--not in determining whether plaintiffs' counsel was entitled to such award. Specifically, Judge Childs referred to Professor Freeman's opinion on the following three *Barber* factors: (1) the time and labor expended; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose. *Id.* at *3, *6, and *7. Judge Childs also cited to Professor Freeman's opinion on the lodestar cross-check of the fee award amount under the percentage-fee method used by the Court. *Id.* at *8. Judge Childs did not refer to Professor Freeman's testimony in determining whether plaintiffs' counsel was entitled to an award under Section 1132 of ERISA. She considered Professor Freeman's testimony only in assessing the reasonableness of the fees awarded. Accordingly, the admissibility of Professor Freeman's expert opinion by Judge Childs in the *Savani* case does not support Petitioners' claim that his expert opinion is admissible in this case to show that the Town acted with substantial justification or brought this contested case solely for the purpose of delay.

Petitioners contend that the Freeman Affidavit is admissible pursuant the Supreme Court holding in *Vortex Sports & Entertainment, Inc. v. Ware*, 378 S.C. 197, 662 S.E.2d 444 (Ct. App. 2008). However, the *Vortex* decision can be easily distinguished from the present case. In *Vortex*, the Supreme Court found that the trial properly admitted Professor Freeman's expert testimony because Professor Freeman's experience in the substantive body of law--corporate law--qualified him to opine on self-dealing by a corporation's former officer. *Id.* at 208, 662 S.E.2d at 450. The trial court qualified Professor Freeman as an expert “in the field of duties owed by corporate lawyers, officers, or shareholders in connection with transactions involving business in a South

Carolina closed corporation.” *Id.* at 206, 662 S.E.2d at 449. In that case, Professor Freeman has found to have specialized knowledge regarding the underlying factual determinations in the case:

We find Professor Freeman’s testimony consisted of specialized knowledge that assisted the trier of fact to understand the evidence or to determine a fact in issue. He was qualified as an expert, and thus, was allowed to testify as to his opinion relating to those facts. **He did not make improper legal conclusions or instructions but simply opined regarding acts Ware committed that breached his fiduciary duty.**

Id. at 208, 662 S.E.2d at 450 (emphasis added). Roper Pond argues that *Vortex* does not apply in this case because Professor Freeman has no “scientific, technical, or other specialized knowledge” regarding the underlying factual determinations or the substantive body of law applicable to the claims in this contested case. Roper Pond further argues that Professor Freeman’s opinions regarding the “reasonable attorney” standard are not relevant to the Court’s determination of whether Roper Pond is entitled to an award under S.C. CODE ANN. § 15-77-300 or sanctions against the Town under Rule 72, SCRPA, for bringing the contested case solely for the purpose of delay.

Professor Freeman opines that the contested case “was brought with substantial justification.” (Freeman Affidavit, ¶ 6). “An agency action supported by substantial justification is one which has a reasonable basis in law and fact.” *McDowell v. South Carolina Dep’t of Soc. Servs.*, 304 S.C. 539, 542, 405 S.E.2d 830, 832 (1991). An award of attorneys’ fees and costs under S.C. CODE ANN. § 15-77-300 is based on the actions of the state agency or political subdivision—not the attorney representing the state agency or political subdivision. Such award does not require a showing that the attorney committed malpractice or even represented a party in pressing a frivolous claim. “[A] court need not go so far as to brand a claim ‘frivolous’ in order for it to be found to be without substantial justification.” *Heath v. Cty. of Aiken*, 302 S.C. 178, 183, 394 S.E.2d 709, 712 (1990) (citing *Pierce v. Underwood*, 487 U.S. 552 (1988)). Moreover, even if the attorney for a state agency or political subdivision of the state identifies a novel question of law in the action, the state agency or political subdivision of the state may still be found to have acted without substantial justification under S.C. CODE ANN. § 15-77-300. *Cornelius v. Oconee County*, 369 S.C. 531, 539-40, 633 S.E.2d 492, 497 (2006) (rejecting a county’s argument that it acted “with ‘substantial justification’ within the meaning of the statute” because novel issues were raised by the county in that case). This Court’s determination on whether the Town acted without substantial justification under S.C. CODE ANN. § 15-77-300 involves the application of the facts in

this case to the substantial body of case law interpreting “without substantial justification” under S.C. CODE ANN. § 15-77-300 and an analysis of the Town’s claims under the substantive body of law underlying the Town’s claim in the contested case. In his affidavit, Professor Freeman does not address a subject matter which is beyond the ordinary knowledge of this Court as the trier of fact on Roper Pond’s Petition for Fees. Professor Freeman merely reviewed the filings before this Court and the appellate courts. Professor Freeman has not claimed any “scientific, technical, or other specialized knowledge” to assist the Court in understanding those facts or determining a fact in issue regarding the “without substantial justification” demonstration or the legal basis for the claims raised by the Town in the contested case. Professor Freeman merely cites for the McCall Affidavit and the Ravenel Affidavit in support of his position on the merits of the case. (Freeman Affidavit, ¶¶ 12-15). Therefore, in addition to offering inadmissible legal opinions pursuant to the *Dawkins* holding, the Freeman Affidavit also fails to meet the requirements for admissibility of expert opinions under Rule 702, SCRE.

II. Ravenel Affidavit

Petitioners offer the Ravenel Affidavit in which Mr. Ravenel opines on the factual and legal basis for Town’s claims in this matter. Mr. Ravenel reviewed the filings in the record before this Court and the appellate courts and opined as follows: “Based on my review of the relevant documents, in my professional opinion, the Town presented a colorable, adequate, reasonable and proper factual and legal basis for their request for a contested case hearing seeking review of DHEC’s authorization to Roper Pond, LLC.” (Ravenel Affidavit, ¶ 8). Mr. Ravenel further opines:

11. In my professional opinion as an attorney, the Town of Arcadia Lakes’ claims were well founded and not frivolous. In addition, I have seen no indication that the Town’s actions were simply to delay the Roper Pond project, but rather that the Town has throughout this litigation, expressed a real and serious concern about the impact that the Roper Pond project would have on the aesthetic and environmental qualities of the Town that made it a desirable place to live. The Supreme Court’s dismissal of this case as moot further supports my conclusion. Had the Supreme Court concluded that the Town failed to present a compelling case on the merits, it could have affirmed the Court of Appeals Opinion. Instead, the Supreme Court’s opinion indicates that it believed the Town presented a meritorious case; however, it was unable to grant the requested relief because the project had been completed.

(Ravenel Affidavit, ¶ 8). As with the Freeman Affidavit, Mr. Ravenel reviewed the record in this

matter and opines on how this Court should rule based on his review of the record. Therefore, pursuant to the *Dawkins* holding, the expert opinions offered by Mr. Ravenel are legal opinions on the ultimate issue before this Court and therefore inadmissible. Moreover, as with the Freeman Affidavit, Mr. Ravenel does not address a subject matter which is beyond the ordinary knowledge of the Court as the trier of fact on Roper Pond's Petition for Fees. Mr. Ravenel testifies that his legal practice "has included providing certified mediation services, to litigation, to appellate advocacy on a wide range of issues and cases." (Ravenel Affidavit, ¶ 2). Mr. Ravenel has not claimed any "scientific, technical, or other specialized knowledge" on the applicable substantive law with respect to the claims raised by the Town in this contested case. Yet, he opines that "the Town presented colorable, adequate, reasonable and proper factual and legal basis for their request for a contested case hearing seeking review of DHEC's authorizations to Roper Pond, LLC." (Ravenel Affidavit, ¶ 8). Therefore, in addition to offering inadmissible legal opinions pursuant to the *Dawkins* holding, the Ravenel Affidavit fails to meet the requirements for admissibility of expert opinions under Rule 702, SCRE.

III. McCall Affidavit

Petitioners offer the McCall Affidavit in which Mr. McCall opines that the Petitioners' petition "contained a reasonable basis in law for pursuant their request for a contested case." (McCall Affidavit, ¶ 12). Mr. McCall further opines that "[b]ased upon the history, facts and law in this case, I have concluded, as an attorney and an engineer, that there was a reasonable basis for pursuing this litigation." (McCall Affidavit, ¶ 13). Mr. McCall further opines that "Petitioners' claims were well founded and not frivolous." (McCall Affidavit, ¶ 14). As with the Freeman Affidavit and the Ravenel Affidavit, Mr. McCall opines on the ultimate legal questions before this Court, which is impermissible pursuant to the *Dawkins* holding.

With respect to Mr. McCall's opinions as a professional engineer, he testifies that prior to the filing of this contested case he provided counsel for Petitioners with his professional engineering opinion regarding "appropriate controls" necessary to prevent sedimentation and water quality degradation. (McCall Affidavit, ¶ 8). However, that opinion is not specific to the "appropriate controls" to be utilized for the Roper Pond project, and Mr. Mc Call does not opine that the controls in the storm water pollution prevention plan ("SWPPP") approved by the Department were deficient. Mr. McCall merely opines that based on his review prior to the Petitioners' filing of the contested case, "[s]ignificant sediment deposition would most probably

occur in Roper Pond during and after construction unless appropriate controls were implemented, proper care was taken during construction, and proper maintenance was conducted after construction.” (McCall Affidavit, ¶ 8(a)). Moreover, even if Mr. McCall had provided an opinion regarding the deficiency of control measures in the SWPPP, this Court found that Petitioners failed to offer any evidence that the SWPPP approved by the Department was technically deficient. (Final Order and Decision, pp. 21-22). The Court of Appeals affirmed this Court’s finding on that issue: “We also find significant the absence of any evidence from Appellants that the BMPs to be implemented under the SWPPP were inadequate to prevent sediment from leaving the construction site.” *Town of Arcadia Lakes v. South Carolina Dep’t of Health and Env’tl. Control*, 404 S.C. 515, 531, 745 S.E.2d 385, 393 (Ct. App. 2013). Moreover, since the nature of any deficiencies in the SWPPP would involve technical or specialized knowledge outside of the common knowledge and experience of a trier of fact, it would be expected that Petitioners would have offered an expert to assist the Court in assessing any alleged deficiencies. Rule 702, SCRE. However, Petitioners offered no expert to opine on the sufficiency of the SWPPP at the contested case hearing. Petitioners’ only expert witness offered in this matter testified that he had not reviewed the SWPPP prepared on behalf of Roper Pond. (Administrative Hearing dated September 3 and 4, 2009, hereinafter “Tr.,” p. 201, l. 12 – p. 202, l. 7). Accordingly, Mr. McCall’s testimony regarding the “appropriate controls” is irrelevant to this Court’s determination on whether the Town acted without substantial justification or brought the contested case solely for the purpose of delay.

Finally, the photographs attached to the McCall Affidavit and Mr. McCall’s testimony regarding observations during entry onto the Roper Pond on June 14, 2015 are not properly before this Court. Any entry on Roper Pond’s property to obtain evidence to be admitted in this litigation should have been undertaken in the course of discovery pursuant to Rule 21, SCRPA, and Rule 34, SCRCP. Petitioners’ served no such discovery on Roper Pond. Moreover, this Court has not authorized discovery even though a request for discovery was raised by Petitioners in its Motion to Strike or, Alternatively, to Allow Discovery filed on June 24, 2015. Additionally, the photographs are irrelevant to the determination before this Court as the conditions of the property following construction did not exist at the time of the contested case hearing and therefore do not provide support for the Town’s claim that it acted with substantial justification in bringing the contested case. Accordingly, the photographs attached to the McCall Affidavit and Mr. McCall’s statements regarding his observation upon entry onto the Roper Pond property are inadmissible.

IV. Oral Argument before the Supreme Court

Roper Pond moves to strike Petitioners' statements and quotes from the audio recording of the oral arguments before the Supreme Court on March 18, 2015, or in the alternative, to allow Roper Pond to engage a court reporter produce a full transcript of the oral arguments before the Supreme Court in this matter. The Supreme Court made no rulings from the bench and subsequently filed an Order dismissing the matter as moot. Therefore, the statements from oral arguments are stricken from all filings.

ORDER

IT IS THEREFORE ORDERED that Roper Pond's September 10, 2015 Motion to Strike and January 13, 2016 Motion to Strike are **GRANTED** and the Affidavit of Eugene C. McCall, Jr., the Affidavit of D. Cravens Ravenel, and the Affidavit of John P. Freeman and the opinions contained therein and the statements from the oral arguments before the Supreme Court on March 18, 2015, are hereby stricken.

IT IS FURTHER ORDERED that the Town shall file an amended response to the Third Amended Petition for Fees on or before February 5, 2016, and Roper Pond shall file a reply on or before February 15, 2016.

AND IT IS SO ORDERED.

January 25, 2015
Columbia, S.C.


John D. McLeod, Judge
S.C. Administrative Law Court

CERTIFICATE OF SERVICE

I, Anthony R. Goldman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

January 25, 2016
Columbia, S.C.


Anthony R. Goldman
Judicial Law Clerk

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Town of Arcadia Lakes, Robert L. Jackson, Linda)
Z. Jackson, Robert E. Williams, Jr., Barbara S.)
Williams, Elizabeth M. Walker, Louis E. Spradlin,)
Mary Helen Spradlin, Thomas Hutto Utsey, Tony)
Sinclair, Aaron Small, Bette Small, Gene F. Starr,)
M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L.)
Marcus, and Steven Brown,)

Docket No. 09-ALC-07-0069-CC

Petitioners,)

vs.)

South Carolina Department of Health and)
Environmental Control and Roper Pond, LLC,)

Respondents.)

ORDER

On June 24, 2015, Counsel for Petitioners filed a Motion To Strike in response to Roper Pond, LLC's ("Roper") Petition For Attorney's Fees and Costs and For Sanctions Pursuant to Rule 72. A hearing on the motion to strike was scheduled to be heard on Wednesday, August 5, 2015.

However, on Monday, August 3, 2015, Counsel for Petitioners emailed the Court, requesting, on behalf of all parties, a bifurcation of the issues regarding sanctions and cost, as it pertains to Roper's motion. Counsel for Petitioners informed the Court as well that if the request is granted it would withdraw the motion to strike with express right to re-file that motion should the Court determine that any liability exists.

IT IS HEREBY ORDERED that the request to bifurcate is **GRANTED**.

IT IS FURTHER ORDERED that Petitioners may withdraw the motion to strike without prejudice with leave to re-file.

IT IS FURTHER ORDERED that the motion hearing scheduled for Wednesday, August 5, 2015, is **CANCELLED**.

August 3, 2015
Columbia, S.C.



John D. McLeod, Judge
South Carolina Administrative Law Court

FILED

AUG 03 2015

CERTIFICATE OF SERVICE

I, Anthony R. Goldman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

August 3, 2015
Columbia, S.C.



Anthony R. Goldman
Judicial Law Clerk

The Supreme Court of South Carolina

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners,

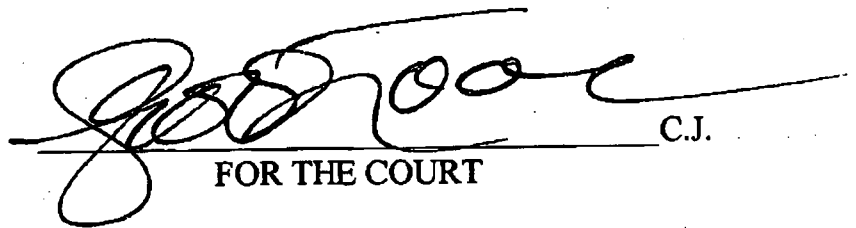
v.

South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.

Appellate Case No. 2013-001521

ORDER

The Motion for Costs filed on behalf of respondent, Roper Pond, LLC, in the above entitled matter is denied.


C.J.
FOR THE COURT

Pleicones, J., not participating

Columbia, South Carolina

June 17, 2015

cc:

W. Thomas Lavender, Jr., Esquire

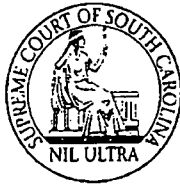
Joan Wash Hartley, Esquire

Amy Elizabeth Armstrong, Esquire

Stephen Philip Hightower, Esquire

Jacquelyn Sue Dickman, Esquire

James Blanding Holman, IV, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
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www.sccourts.org

April 28, 2015

The Honorable Jana Shealy
Clerk, South Carolina Administrative Law Court
1205 Pendleton Street
Columbia SC 29201

REMITTITUR

Re: Town of Arcadia Lakes v. SCDHEC
Lower Court Case No. 2009-AL-07-00069
Appellate Case No. 2013-001521

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

cc:

W. Thomas Lavender, Jr., Esquire

Joan Wash Hartley, Esquire

Amy Elizabeth Armstrong, Esquire

Stephen Philip Hightower, Esquire

Jacquelyn Sue Dickman, Esquire

James Blanding Holman, IV, Esquire

The Supreme Court of South Carolina

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners,

v.

South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.

Appellate Case No. 2013-001521

Lower Court Case No. 2009AL0700069

ORDER

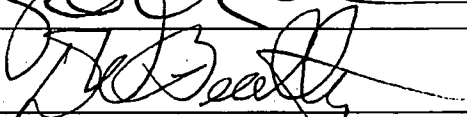
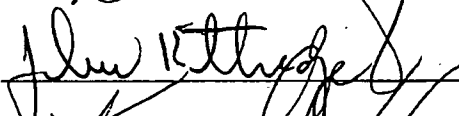
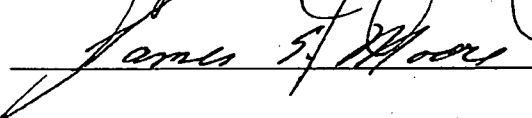
We granted a petition for a writ of certiorari to review the court of appeals' decision in *Town of Arcadia Lakes v. South Carolina Department of Health and Environmental Control*, 404 S.C. 515, 745 S.E.2d 385 (Ct. App. 2013), in which the court of appeals affirmed certifications for certain construction activities (including land disturbance and storm water discharges) under a state-wide general permit. Essentially, Petitioners' contention is that Respondent Roper Pond, LLC, (Roper) does not qualify for coverage under a state-wide general permit, and therefore, Roper's construction activities are not authorized to proceed.

At oral argument before this Court, the parties conceded Roper's construction project proceeded and was completed during the pendency of this matter.¹ As all

¹ "[T]he serving and filing of the notice of appeal does not itself stay enforcement of the administrative law judge's decision." S.C. Code Ann. § 1-23-610 (A)(2) (Supp. 2014); *see also* S.C. Code Ann. § 1-23-600(H)(5) (Supp. 2014) ("A final decision issued by the Administrative Law Court in a contested case may not be stayed except by order of the Administrative Law Court or the court of appeals.");

construction activities subject to and authorized by the state-wide general permit have been completed, Roper's coverage under the state-wide general permit has now terminated.

Accordingly, we dismiss this matter as moot, as it is now impossible for this Court to grant any redress in the context of the issues as framed and litigated below (i.e., modify or revoke authorization for Roper's construction activities under the state-wide general permit).² See *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006) ("A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court. If there is no actual controversy, this Court will not decide moot or academic questions." (citing *Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973))).

	_____	C.J.
	_____	J.
	_____	J.
	_____	J.
	_____	A.J.

Columbia, South Carolina

April 9, 2015

Rule 241(b)(11), SCACR (noting that, in appeals from administrative tribunals, the service of a notice of appeal does not automatically stay matters decided in orders).

² As to Petitioners' concerns regarding post-construction stormwater, sedimentation, and water-quality issues, counsel for Respondent South Carolina Department of Health and Environmental Control (DHEC) assured this Court at oral argument that DHEC has the ongoing ability to receive and investigate post-construction complaints and the prosecutorial discretion to initiate regulatory enforcement proceedings for any violations of applicable law.

cc:

W. Thomas Lavender, Jr., Esquire

Joan Wash Hartley, Esquire

Amy Elizabeth Armstrong, Esquire

Stephen Philip Hightower, Esquire

Jacquelyn Sue Dickman, Esquire

James Blanding Holman, IV, Esquire

The Honorable Jana Shealy

The Supreme Court of South Carolina

Town of Arcadia Lakes, Robert L. Jackson, Linda Z.
Jackson, Robert E. Williams, Barbara S. Williams,
Elizabeth M. Walker, Louis E. Spradlin, Thomas Hutto
Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F.
Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L.
Marcus, and Steven Browb, Petitioners,

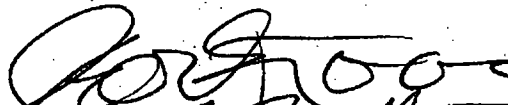
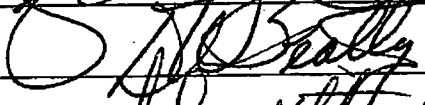
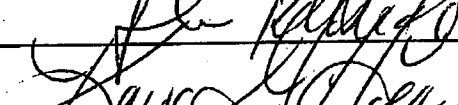
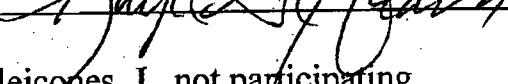
v.

South Carolina Department of Health and Environmental
Control and Roper Pond, LLC, Respondents.

Appellate Case No. 2013-001521
Lower Case No. 2009-AL-07-00069

ORDER

We grant the petition for a writ of certiorari to review the Court of Appeals' decision in *Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control*, 404 S.C. 515, 745 S.E.2d 385 (Ct. App. 2013). The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

 C.J.
 J.
 J.
 J.
Pleicones, J., not participating

Columbia, South Carolina

August 22, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Town of Arcadia Lakes, Robert L. Jackson, Linda Z.
Jackson, Robert E. Williams, Barbara S. Williams,
Elizabeth M. Walker, Louis E. Spradlin, Thomas Hutto
Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F.
Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L.
Marcus, and Steven Brown, Appellants,

v.

South Carolina Department of Health and Environmental
Control and Roper Pond, LLC, Respondents.

Appellate Case No. 2010-159446

Appeal From The Administrative Law Court
John D. McLeod, Administrative Law Judge

Opinion No. 5095
Heard May 8, 2012 – Filed March 6, 2013
Withdrawn, Substituted, and Refiled June 12, 2013

AFFIRMED

Amy E. Armstrong, of South Carolina Environmental
Law Project, of Georgetown, for Appellants.

W. Thomas Lavender, Jr. of Nexsen Pruet, LLC, of
Columbia, and J. Michael Harley, of Barrington, IL, for
Respondent Roper Pond, LLC; Roger Page Hall and
Stephen Philip Hightower, both of Columbia, for
Respondent SCDHEC.

THOMAS, J.: The Town of Arcadia Lakes (Town) and various individuals appeal a decision by the Administrative Law Court (ALC) upholding the authorization by the South Carolina Department of Health and Environmental Control (DHEC) of coverage for certain land-disturbing activities under a State General Permit. We affirm.

FACTS AND PROCEDURAL HISTORY

Respondent Roper Pond, LLC (Roper) is the owner and developer of 12.75 acres of real property on Trenholm Road in an unincorporated area of Richland County. The property includes 1.8 acres consisting of wetlands and waters that were identified by the United States Army Corps of Engineers (Corps) in 2005 as falling under the jurisdiction of the Federal Clean Water Act (CWA).¹ These jurisdictional wetlands include Roper Pond, a man-made pond that is visible from Trenholm Road but wholly within the boundaries of Roper's property. Before implementation of the project at issue in this appeal, water lilies covered the surface of Roper Pond.

Roper Pond drains through a pipe that runs beneath Trenholm Road and into Cary Lake. Cary Lake is privately owned by the Cary Lake Homeowners Association, which is not a party to this litigation. Although Cary Lake lies partly within the boundaries of the Town, the Town has no ownership interest in it and is not responsible for its maintenance or remediation.

In August 2007, Roper submitted to the Corps its initial plans for a multifamily apartment development to be built on its property. As part of this undertaking, Roper needed a permit for stormwater discharges from land-disturbing activities associated with the project. See S.C. Code Ann. § 48-14-30(A) (2008) (prohibiting land-disturbing activities without the submission of a stormwater management and sediment control plan to the appropriate agency and a permit to proceed with these activities); 9 S.C. Code Ann. Regs. 72-305 (Supp. 2012) (stating similar prohibitions to section 48-14-30(A) and setting out the permit application and approval process).

To expedite matters, Roper could "seek coverage under a promulgated storm water general permit" instead of obtaining an individual permit. See 3 S.C. Code Ann.

¹ 33 U.S.C. §§ 1251 *et seq.* (2006).

Regs. 61-9.122.26(c)(1) (2012) ("Dischargers of storm water associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated storm water general permit."). Under 3 S.C. Code Ann. Regs. 61-9.122.28 (2012), DHEC is authorized to issue general permits for stormwater discharges from projects that meet certain criteria. Pursuant to this authority, DHEC issued Permit Number SCR100000 (State General Permit) on August 1, 2006. The State General Permit, which DHEC described as an "NPDES General Permit for Storm Water Discharges from Large and Small Construction"² covered discharges from the commencement of an authorized project until final stabilization of the construction site.

In 2006, DHEC published a Guidance Document for the State General Permit advising prospective permittees about the need to obtain necessary permits from the Corps. In this particular case, Roper was required under section 404 of the CWA to obtain a wetlands permit from the Corps because it intended to fill some of the jurisdictional wetlands on the project site. *See* 33 U.S.C. § 1344(a) (2006) (authorizing the Corps to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites").

Under section 404(e) of the CWA, the Secretary of the Army is authorized to issue Nationwide Permits (NWP) for any category of similar activities involving discharges of dredged or fill material determined to "cause only minimal adverse environmental effects when performed separately" and to "have only minimal cumulative adverse effect [sic] on the environment." 33 U.S.C. § 1344(e)(1) (2006). If a proposed activity meets the applicable regional and general conditions for an NWP, application for its authorization can proceed more quickly than it would if the applicant sought an individual permit. On March 12, 2007, the Corps issued NWP 29 and NWP 39, the two NWPs at issue in the present litigation. NWP 29 applied to residential developments, and NWP 39 applied to commercial and institutional developments.

The requirement for a 404 permit from the Corps in turn triggers a requirement under section 401 of the Clean Water Act for water quality certification that any discharge into navigable waters is consistent with federal and state water quality

² As authorized by the Clean Water Act, the National Pollutant Discharge Elimination System (NPDES) Permit Program controls water pollution by regulating point sources that discharge pollutants into waters of the United States. The program is administered by authorized states, including South Carolina.

standards (401 certification). 401 certification is required "from the State in which the discharge originates or will originate." 33 U.S.C. § 1341(a)(1) (2006).³ On May 11, 2007, pursuant to its regulatory authority, DHEC issued 401 certifications for projects covered under NWP 29 and NWP 39.⁴ DHEC 401 certifications for all NWPs included general conditions that a given project must meet, including the requirement that DHEC, in reviewing a project for which coverage under an NWP is sought, would consider not only the land area directly impacted by each NWP request, but also impacts to adjacent water bodies or wetlands resulting from the activity.

On April 30, 2008, George Whatley, a wetland scientist for BP Barber, submitted a joint federal and state application for the proposed construction project on Roper's property. On the application, Whatley noted the project would involve the filling of 0.075 acres of jurisdictional wetlands.⁵ On May 5, 2008, Whatley submitted a

³ DHEC regulations reference this requirement as well. See 8 S.C. Ann. Regs. 61-101.A.2 (2012) (stating federal law requires an applicant for a federal permit to conduct an activity that "during construction or operation may result in any discharge to navigable waters" "to first obtain a certification from [DHEC]" and stating that "Federal law provides that no Federal license or permit is to be granted until such certification is obtained").

⁴ See 8 S.C. Code Ann. Regs. 61-101.A.3 (2012) ("[DHEC] may issue, deny, or revoke general certifications for categories of activities or for activities specific in Federal nationwide or general dredge and fill permits pursuant to Federal law or regulations."); 33 C.F.R. § 330.4(c)(1) (2013) ("State 401 water quality certification pursuant to section 401 of the Clean Water Act, or waiver thereof, is required prior to the issuance or reissuance of NWPs authorizing activities which may result in a discharge into waters of the United States.").

⁵ As noted earlier, the CWA requires a 404 permit for certain discharges of dredged or fill material into navigable waters. The term "navigable waters" is defined in the CWA as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (2006). The United States Supreme Court has imposed limitations on the inclusion of wetlands, holding that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the [CWA]." *Rapanos v. U.S.*, 547 U.S. 715, 742 (2006) (emphasis in original). In the present case, the

pre-construction notification (PCN) to the Corps. In the PCN, Whatley noted: (1) although Roper initially advised the Corps in 2007 that the project would impact 0.099 acres of jurisdictional wetlands, the project was redesigned to reduce impacts to 0.075 acres and (2) "best management practices" (BMPs) would be implemented to ensure that construction activities would not impact jurisdictional areas lying outside the permitted impact areas. Whatley further requested that the Corps review the project for possible coverage under an NWP; however, he did not specify any particular NWP under which the activity would be conducted.

No other impacts to water quality were disclosed on the application; however, according to subsequent e-mails between BP Barber and the Corps, Whatley notified the Corps that the project included lowering the elevation of Roper Pond and the discharge of the soil and sediment from the bottom of the pond into an upland area. According to the e-mails, Whatley inquired whether either of these was an impact to be considered in obtaining approval for the construction, and the Corps advised: (1) lowering the pond was not an impact and (2) excavation of the pond would be exempt from permitting requirements provided the excavated material was "placed in a truck or deposited onto uplands" and there was "[n]o double handling or stockpiling in jurisdictional areas."

Pursuant to the requirements for coverage under the State General Permit, a Stormwater Pollution Prevention Plan (SWPPP) was prepared for the project on June 26, 2008. DHEC reviewed the SWPPP and requested certain revisions.

By letter dated September 9, 2008, the Corps advised Whatley: (1) it reviewed the PCN and determined the proposed activity would "result in minimal individual and cumulative adverse environmental effects and [was] not contrary to public interest"; (2) the activity met the terms and conditions of NWP 39; and (3) for authorization to remain valid, the project had to comply with general conditions of the NWP, regional conditions, and certain special conditions, namely, that Roper obtain and provide the Corps with "all appropriate state certifications and/or authorizations (i.e. 401 Water Quality Certification, Coastal Zone Management Consistency Determination, State Navigable Waters Permit)." Consistent with its usual practice, the Corps sent a copy of the September 9, 2008 letter to DHEC as well as to Whatley.

On September 24, 2008, Roper submitted to DHEC a notice of intent (NOI) to discharge storm water associated with its proposed project, now designated as

parties do not dispute that the 0.075 acres of wetlands to be filled in conjunction with Roper's proposed project were "jurisdictional wetlands" subject to the CWA.

Roper Pond Apartments, seeking approval from DHEC to have the stormwater discharges covered under the State General Permit.⁶ According to the NOI, the project site was 12.8 acres, of which 9.9 acres would be disturbed by land-clearing activities.

DHEC responded to Whatley by letter dated October 2, 2008, advising it determined that the impacts of the project on water quality would be minimal and that the proposed work would be consistent with the 401 certification issued in 2007 for NWP 39, subject to various conditions not at issue in this appeal.

On November 17, 2008, DHEC staff engineer Jill Stewart e-mailed BP Barber to express various concerns. Among these concerns was information she received that the proposed plans for Roper Pond Apartments included lowering of the water surface elevation of Roper Pond to allow for detention of post-development runoff of stormwater. Stewart inquired whether the dropping of the water surface elevation should be taken into account in determining if a site is eligible for coverage under NWP 39. BP Barber responded the following day, informing Stewart that its wetlands consultant advised "the lowering of the water surface elevation is included and covered under [NWP 39]."

In December 2008, DHEC issued a letter acknowledging it was satisfied that the revised SWPPP met the requirements of the State General Permit and the applicable regulations. On December 15, 2008, DHEC staff granted Roper coverage under the State General Permit for its stormwater discharges associated with construction of Roper Pond Apartments.

By letter dated December 30, 2008, Appellants and other individuals requested that the DHEC Board review and overturn the decision.⁷ Among the technical issues raised in the letter were Roper's failure to disclose its intent to lower the elevation of Roper Pond and an allegation that it sought coverage under the wrong NWP. On January 14, 2009, DHEC responded to the letter, informing Appellants that the Board declined to conduct a final review conference and that anyone aggrieved by the decision could request a contested case hearing in the ALC. On February 16, 2009, Appellants filed a request for a contested case hearing in the ALC.

⁶ The NOI was on a DHEC form entitled "Notice of Intent (NOI) for Stormwater Discharges from Large and Small Construction Activities, NPDES General Permit SCR100000."

⁷ Additional facts about Appellants will be presented in the LAW/ANALYSIS section of this opinion.

Meanwhile, on January 6, 2009, Whatley e-mailed the Corps requesting a corrected letter indicating the impacts of the project would be covered under NWP 29 instead of NWP 39. As noted earlier, Whatley also recounted Roper's plans to lower the elevation of Roper Pond and its intent to remove the excavated material to an upland area and his understanding that Roper did not need approval from the Corps for these activities. By letter to Whatley dated February 25, 2009, the Corps advised that it determined the proposed activity would result in minimal individual and cumulative adverse environmental effects, would not be contrary to the public interest, and met the terms and conditions of NWP 29. Except for the particular NWP referenced, the language in the February 25, 2009 letter was identical to the corresponding language in its September 9, 2008 letter.

As it did with the September 9, 2008 letter, the Corps sent a copy of its February 25, 2009 verification letter to DHEC. DHEC, however, did not issue another authorization letter advising Roper that the project would be consistent with the 401 certification issued in 2007 for NWP 29. According to Charles Hightower, DHEC's Section Manager of the 401 Wetlands Section, the purpose of such notification from DHEC is to provide an applicant assurance that the applicant's proposed project falls within the conditions of DHEC's 401 certification. Hightower further testified that Roper's proposed fill of the 0.075 acres of jurisdictional wetlands satisfied the necessary conditions to receive 401 water quality certifications for both NWP 29 and NWP 39 and that because the requisite conditions had been met, Roper did not need to notify DHEC before proceeding with the project under NWP 29.

On June 17, 2009, in response to a motion by Roper to dismiss Appellants' request for a contested case hearing, the ALC issued a consent order in which the parties agreed to the dismissal of all claims raised by Appellants challenging the 401 certification and authorization to conduct activities under NWP 39 for the proposed development. The partial dismissal did not affect Appellants' claims and Roper's defenses in connection with the 401 certification and authorization under NWP 29.

The contested case hearing before the ALC took place on September 3 and 4, 2009. Stewart, Hightower, Whatley, and several individual Appellants testified. The record on appeal also includes depositions from various individuals, including Stewart and Hightower. In addition, Appellants called Seth Reice, Ph.D., a professor of ecology and biology at the University of North Carolina at Chapel Hill, as an expert on aquatic ecology. Although Reice admitted he previously opined that the proposed excavation of the Pond would have disastrous consequences, he now admitted this was only conjecture. Furthermore, Reice's primary interest was sedimentation, and he admitted he had no direct experience

with excavation. When asked if he believed the land-disturbing activities conducted in conjunction with Roper Pond Apartments would have an adverse impact on Roper Pond, Reice stated only that "[i]t doesn't sound good" and he would "be surprised if they didn't," but declined to offer an expert opinion about the probable results. On cross-examination, Reice also stated he was not provided copies of Roper's SWPPP and except for what he heard at the hearing, had no knowledge of the BMPs that Roper intended to follow in order to minimize the impact of its construction activities.

On January 21, 2010, the ALC issued a final order upholding DHEC's approval of coverage under the State General Permit on the merits and further finding that Appellants lacked standing to challenge DHEC's decision. On March 23, 2010, following a hearing on a motion for stay by Appellants, the ALC temporarily stayed its final order pending a decision on Appellants' motion for reconsideration.

By order dated April 1, 2010, the ALC denied Appellants' motion to reconsider and lifted the temporary stay. Appellants then filed their notice of appeal to this court.

ISSUES⁸

I. Did the ALC err in finding Appellants lacked standing to challenge DHEC's decision to authorize coverage for Roper Pond Apartments under the State General Permit?

II. Did the ALC err in holding the 401 certification issued by DHEC was sufficient for a valid 404 permit and coverage under the State General Permit?

III. Did the ALC err in holding that Roper's proposed stormwater control activities could be covered under the State General Permit?

⁸ The Home Builders Association of South Carolina has filed an *amicus curiae* brief asserting that Appellants seek to add an unnecessary step in stormwater regulation and nationwide permitting that would have adverse consequences for the construction industry, the housing market, and the public at large and that existing programs and regulations sufficiently protect the public interest in the permitting process. Because our rulings on the issues Appellants have presented are dispositive of this appeal, we decline to address these policy concerns. See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when its disposition of a prior issue is dispositive of the appeal).

STANDARD OF REVIEW

The standard of review that an appellate court is to apply to appeals from the ALC is set forth in the South Carolina Administrative Procedures Act (APA), specifically in section 1-23-610 of the South Carolina Code (Supp. 2012). *Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191 191, 194 (2012). Under section 1-23-610(B), a reviewing court may reverse or modify a decision by the ALC if the substantive rights of the appellant have been prejudiced because of a finding, conclusion, or decision that: (1) violates constitutional or statutory provisions; (2) exceeds the agency's statutory authority; (3) is made upon unlawful procedure; (4) is affected by other error of law; (5) is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) is arbitrary, capricious, or characterized by either abuse of discretion or clearly unwarranted exercise of discretion. Section 1-23-610 has been applied not only to findings by the ALC on the merits of a controversy but also to findings by the ALC concerning a party's standing to maintain an action. *See Bailey v. S.C. Dep't of Health & Envtl. Control*, 388 S.C. 1, 4-8, 693 S.E.2d 426, 428-30 (Ct. App. 2010) (referencing only the APA in stating the standard of review, but ultimately affirming the ALC on the ground that appellant lacked standing and declining to address appellant's remaining arguments), *cert. denied* (July 7, 2011).

LAW/ANALYSIS

I. Standing

Appellants in this case are: (1) the Town; (2) various residents of Kaminer Station, a subdivision adjacent to and uphill from Roper Pond (Kaminer Station Appellants);⁹ and (3) various individuals whose properties border Cary Lake (Cary Lake Appellants).¹⁰ The ALC found none of these groups had standing to maintain this action. We agree.

⁹ The Kaminer Station Appellants are Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Toney Sinclair, Aaron Small, and Bette Small.

¹⁰ The Cary Lake Appellants are Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown.

"Standing to sue is a fundamental requirement in instituting an action." *Bodman v. State of S.C.*, Op. No. 27248 (S.C. Sup. Ct. filed May 8, 2013) (Shearouse Adv. Sh. No. 21 at 27, 31) (quoting *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999)). "When no statute confers standing, the elements of constitutional standing must be met." *Youngblood v. S.C. Dep't of Soc. Servs.*, ___ S.C. ___, ___, 741 S.E.2d 515, 518 (2013).¹¹

In *Sea Pines Association for Protection of Wildlife, Inc. v. South Carolina Department of Natural Resources*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001), the Supreme Court of South Carolina, quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), set forth three requirements that must be met to satisfy "the irreducible constitutional minimum of standing":

First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not "conjectural" or "hypothetical." Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

(Citations omitted).

"The party seeking to establish standing carries the burden of demonstrating each of the three elements." *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice" to withstand a motion to dismiss. *Lujan*, 504 U.S. at 561. Elements of standing, however, "are not mere pleading requirements but rather an indispensable part of the plaintiff's case"; therefore, "each element must be supported in the same way as any other matter on which the plaintiff bears the

¹¹ The ALC did not consider whether the "public importance" exception could confer standing on any of the Appellants, and Appellants have not raised this exception in their brief. See *Davis v. Richland Cnty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007) ("[S]tanding may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.").

burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stage of the litigation." *Id.* (quoted in *Beaufort Cnty. v. Trask*, 349 S.C. 522, 528 n.14, 563 S.E.2d 660, 663 n.14 (Ct. App. 2002)).

A. The Town

The ALC found the Town did not satisfy the first element required to establish standing, namely, that it had a personal stake in the litigation. Quoting *Glaze v. Grooms*, 324 S.C. 249, 255, 478 S.E.2d 841, 845 (1996), the ALC referenced the general rule that "a municipality must allege an infringement of its own proprietary interests or statutory rights to establish standing." In response to this statement, Appellants advocate a broad interpretation of the term "proprietary interest" in determining whether the Town has demonstrated an injury in fact sufficient to confer standing. In the present case, Appellants argue "proprietary interests" include: (1) the Town's interest in protecting the environmental quality of Cary Lake, which lies partly within the Town borders; (2) the Town's ability to comply with federal law, such as NPDES regulations; (3) the Town's interest in maintaining its character and desirable attributes, including its aesthetic appeal; and (4) the diminution of property values within the Town and other adverse effects of a nearby apartment complex on such concerns as security and traffic congestion. We hold that none of these professed interests, whether "proprietary" or not, are sufficient to confer standing on the Town in this case.

As to the first two concerns, Town Mayor Richard Thomas testified in a deposition that the Town had no ownership interest in Cary Lake. Mayor Thomas gave a brief statement that under NPDES regulations, the Town was responsible for water that flowed out of Cary Lake, but provided no supporting authority for this assertion.¹² Moreover, he acknowledged the Town is not responsible for the

¹² In their reply brief, Appellants cite title 33, section 1342(p) of the United States Code (2006), which the United States Congress added to the CWA in 1987. This section covers municipal and industrial stormwater discharges. Under paragraph (4) of this section, the Administrator of the Environmental Protection Agency is required to establish regulations setting forth permit application requirements for discharges from municipal separate stormwater systems and either the Administrator or appropriate State agency would eventually acquire the authority to issue and deny such permits. We have found nothing in this section either requiring a municipality to obtain a permit for stormwater discharges from a stormwater system that is already covered by a permit or holding a municipality responsible for such discharges.

maintenance of Cary Lake, has never allocated funds for this purpose, and has never incurred any fines under NPDES regulations despite alleged problems in the past with water flowing into Cary Lake. He also stated that Cary Lake is the "bottom lake," that is, the final lake into which the remaining six lakes flow. We also find significant the absence of any evidence from Appellants that the BMPs to be implemented under the SWPPP were inadequate to prevent sediment from leaving the construction site; thus, Appellants have also failed to show their alleged injuries are "fairly traceable" to the challenged action in this case. Similarly, Appellants have not shown any causal connection between the authorization of coverage to Roper for land-disturbing activities under the State General Permit and either of their two remaining concerns. Therefore, pursuant to section 1-23-610, we affirm the ALC's determination that the Town lacks standing.

B. Kaminer Station Appellants

The ALC found the Kaminer Station Appellants failed to establish either an injury in fact from the permitting decision or a causal connection between the challenged decision and their alleged injuries. We agree with the ALC to the extent that it found that Appellants have failed to establish any injury that would be traceable to the permitting decision.

Linda Jackson, one of the Kaminer Station Appellants, conceded that "water flows down" and there was no serious concern that stormwater from Roper Pond would flow uphill to Kaminer Station. However, Jackson also described the visual appeal of Roper Pond and her appreciation of the nature sounds in the area. She also testified that she had fished on Cary Lake and had seen changes for the worse in that area as it developed. Such observations, even if shared by many others, arguably can still form the basis for a concrete and particularized injury that would confer standing. *See Pye v. U.S.*, 269 F.3d 459, 469 (4th Cir. 2001) ("[M]erely because an injury is widely held does not necessarily render it abstract and thus not judicially cognizable. . . . So long as the plaintiff himself has a concrete and particularized injury, it does not matter that legions of other persons have the same injury."). Moreover, even those concerns reflecting aesthetic or recreational interests have been recognized as "judicially cognizable injur[ies] in fact." *Sea Pines*, 345 S.C. at 602, 550 S.E.2d at 292. Nonetheless, when such interests involve property that is privately owned by a party other than the plaintiff, the presence of an injury in fact cannot be assumed. *Cf. Conservation Council of N.C. v. Costanzo*, 505 F.2d 498, 501-02 (4th Cir. 1974) (stating the plaintiffs'

recreational use of privately owned property as either licensees or trespassers did not confer standing to challenge development on that property because there was no evidence that the owner of the property would allow such use to continue in the future). Here, the affected bodies of water, Roper Pond and Cary Lake, are privately owned by parties other than Appellants.

Furthermore, we hold substantial evidence supports the ALC's determination that the Kaminer Station Appellants have not established a causal connection between their alleged injuries and the conduct giving rise to their complaint. When Roper's attorney asked Jackson to explain the injuries she would suffer if the land-disturbing activities for which coverage under the State General Permit was granted were managed properly, she responded only that "we don't know how it's going to be managed." Jackson also conceded that much of her dissatisfaction with prior construction in the area was due to violations of the applicable permits rather than the permits themselves. Furthermore, Reice's inability to offer a definitive opinion about the impact of the dredging of the pond supports the ALC's finding that the Kaminer Station Appellants have failed to meet the second requirement for standing.

C. Cary Lake Appellants

Finally, we agree with the ALC that the Cary Lake Appellants failed to show that granting coverage for Roper Pond Apartments under the State General Permit would cause an actual or imminent injury and therefore lacked standing to challenge DHEC's decision to grant coverage under the State General Permit.

Testifying for the Cary Lake Appellants, Elaine Starr stated her home, where she has lived since 1971, borders Cary Lake, which is on the opposite side of Trenholm Road from Roper Pond. She further testified that she had a bachelor's degree in biology and had done graduate work in wetlands and coastal resources. She had participated in several organizations that were concerned with water quality, and she and her family have made extensive use of Cary Lake for recreational purposes. Starr testified about her empirical observations of the decline in the water quality of Cary Lake and how these observations were supported by her use of a Secchi disk, a technique to measure water clarity. She also expressed concerns about the possible demise of the water lilies due to the dredging of Roper Pond, noting "if their [rhizomes] or root systems get damaged or taken away, . . . they may not be there."

According to Starr, the increased sedimentation in Cary Lake that she described resulted from prior occurrences involving possible mismanagement. However,

there was no evidence that the project at issue here would lead to similar results. Starr admitted she had not reviewed the SWPPP for the proposed project and was unable to offer any specific challenge to DHEC's determination that the SWPPP was not, under the terms of the State General Permit, a sufficient precaution against the consequences she claimed would result from the building of Roper Pond Apartments. Finally, similar to what we noted in our discussion about the Kaminer Station Appellants, the complaints of the Cary Lake Appellants primarily concern Roper Pond and Cary Lake, both of which are privately owned and maintained by parties other than Appellants, and are thus not injuries in fact. We therefore agree with the ALC that the Cary Lake Appellants presented at best only speculative evidence that they would suffer an injury in fact from DHEC's decision to allow Roper Pond Apartments to be covered under the State General Permit.

II. Validity of the 401 Certification

Appellants further argue the 401 certification issued by DHEC was insufficient to satisfy the requirements Roper needed to fulfill to obtain a 404 permit because: (1) the 401 certifications that DHEC issued for projects authorized under NWP 29 or NWP 39 could not apply to the excavation of the pond because that activity was not disclosed when Roper applied to the Corps for a 404 permit; (2) the project did not comply with certain general conditions applicable to all NWPs, specifically that DHEC consider the impacts to all land within a project boundary and to adjacent bodies of water or wetlands; (3) DHEC never issued a formal certification that the project met the conditions under NWP 29 for water quality certification; and (4) DHEC failed to conduct the required review for compliance with certain water quality regulations. We hold none of these allegations warrant reversal of the ALC's finding that Roper had an effective 401 certification for its proposed project.

First, although Roper did not initially inform the Corps that it intended to dredge and excavate the pond as part of the project, as of January 6, 2009, when Whatley requested a corrected letter from the Corps indicating that the impacts of the project would be covered under NWP 29 instead of NWP 39, the Corps had been informed that such an activity was to be part of the project. Having received this information, the Corps nevertheless determined that the project would result in "minimal individual and cumulative environmental effects" and met the conditions of NWP 29.

As to Appellants' second argument, we agree with their position that the general conditions for water quality certification require DHEC to review the "overall project proposed by a single owner/developer," "includes all land within the project

bound under single ownership," and is not confined to "the land area directly impacted by each NWP request" and their assertion that no one at DHEC undertook a complete examination of the impact of the project on all waters and wetlands at the project site or determined if feasible alternatives were available. Here, however, 401 certification was necessary only as a prerequisite to obtaining a 404 permit from the Corps for filling the jurisdictional wetlands. This requirement was pursuant to 33 U.S.C. section 1341(a)(1) (2006), which states in pertinent part:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, *which may result in any discharge into the navigable waters*, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, . . . that any such discharge will comply with the applicable provisions

(emphasis added). Appellants have emphasized they never argued that a 404 permit was necessary to dredge and excavate the pond, and there was no contention here that this activity would result in a discharge into a navigable water.

Furthermore, according to their brief, the specific "impacts" that Appellants maintain were overlooked by DHEC pertained only to the pond. As Appellants point out, under DHEC's general conditions, Roper was required to: (1) demonstrate that impacts to wetlands have been avoided and that unavoidable impacts to wetland areas have been minimized; and (2) provide suitable compensation for any unavoidable impacts. Roper, as the owner of the property on which the pond is located, would be the proper party to object to impacts that have not been avoided or minimized and to enforce compensation for any unavoidable impacts. In other words, Roper would be placed in the illogical position of having to complain about its own project or to demand compensation from itself.

Based on our interpretation of the events in this case, we disagree with Appellants' third argument, their assertion that the project never received a proper water quality certification for coverage under NWP 29. We acknowledge Hightower admitted that after DHEC received notice from the Corps that the project would be covered under NWP 29, it did not issue a letter advising Roper that the project would be consistent with the 401 certification it issued for this NWP and agreed that sending such a letter would have been advisable; however, he also testified that an authorization letter was only a formality for the applicant's benefit and was

not required by the State General Permit. The Corps verified that Roper's proposed work was eligible for coverage under NWP 29, and DHEC, consistent with its regulatory authority, had already issued a 401 certification for projects covered under NWP 29. A follow-up letter would have served only as documentation of this certification, and the absence of such a letter does not mean DHEC failed to issue a water quality certification for the project.

Finally, Appellants have challenged the water quality certification on the ground that DHEC failed to review the project to determine: (1) whether it complied with 6 S.C. Code Ann. Regs. 61-68 (2012) and 8 S.C. Code Ann. Regs. 61-101 (2012), both of which were promulgated pursuant to the South Carolina Pollution Control Act; and (2) the impact of the draining and excavation of Roper Pond. They further argue the ALC erroneously relied on *Responsible Economic Development v. South Carolina Department of Health and Environmental Control*, 371 S.C. 547, 552-53, 641 S.E.2d 425, 428 (2007), for the proposition that "a stormwater permit issued pursuant to the Stormwater Act cannot be denied based on the regulations of the Pollution Control Act." We need not determine whether the ALC correctly applied this holding. We have already determined that the Corps was aware that Roper intended to excavate the pond when it authorized coverage under NWP 29 and that the 401 certification that DHEC issued for this NWP 29 satisfied the water quality certification requirement for a 404 permit.

III. Coverage Under the State General Permit

Finally, Appellants take issue with the finding that Roper was entitled to coverage under the State General Permit. They submit two arguments in support of their position. We reject both arguments.

First, Appellants reiterate their previous argument that Roper was not entitled to coverage because the 401 certification was inadequate for a 404 permit, which in turn was a prerequisite for coverage under the State General Permit. We have already determined that the 401 certification that DHEC issued was sufficient for Roper to obtain coverage under NWP 29.

Appellants further contend that the excavation of the pond and lowering of its surface would make the pond a water control structure and would therefore require, under the terms of the State General Permit, a 404 permit from the Corps, which in turn would require a 401 certification. The ALC did not specifically address the question of whether the use of the pond as a water control structure required a 404 permit, and Appellants did not request a ruling in their motion to reconsider. The issue, then, has not been preserved for appellate review, and it would be improper

for us to address it now. *See Shealy v. Aiken Cnty.*, 341 S.C. 448, 460, 535 S.E.2d 438, 444-45 (2000) (holding an issue was not preserved for appeal because the trial judge's general ruling was insufficient to preserve the specific issue for appellate review and the appellant did not move to alter or amend the judgment pursuant to Rule 59(e), SCRCP); *Hendrix v. Eastern Distribution, Inc.*, 320 S.C. 218, 218, 464 S.E.2d 112, 113 (1995) (vacating an opinion by this court "to the extent it addressed an issue which was not preserved").

CONCLUSION

We agree with the ALC that none of the Appellants had standing to maintain their challenge to the authorization of coverage for Roper Pond Apartments under the State General Permit. As to the merits of Appellants' arguments, we affirm the ALC's ruling that Roper is entitled to this coverage.

AFFIRMED.

WILLIAMS and LOCKEMY, JJ., concur.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Town of Arcadia Lakes, Robert L. Jackson, Linda Z.
Jackson, Robert E. Williams, Barbara S. Williams,
Elizabeth M. Walker, Louis E. Spradlin, Thomas Hutto
Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F.
Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L.
Marcus, and Steven Brown, Appellants,

v.

South Carolina Department of Health and Environmental
Control and Roper Pond, LLC, Respondents.

Appellate Case No. 2010-159446

Appeal From The Administrative Law Court
John D. McLeod, Administrative Law Judge

Opinion No. 5095
Heard May 8, 2012 – Filed March 6, 2013
Withdrawn, Substituted, and Refiled June 12, 2013

AFFIRMED

Amy E. Armstrong, of South Carolina Environmental
Law Project, of Georgetown, for Appellants.

W. Thomas Lavender, Jr. of Nexsen Pruet, LLC, of
Columbia, and J. Michael Harley, of Barrington, IL, for
Respondent Roper Pond, LLC; Roger Page Hall and

Stephen Philip Hightower, both of Columbia, for
Respondent SCDHEC.

THOMAS, J.: The Town of Arcadia Lakes (Town) and various individuals appeal a decision by the Administrative Law Court (ALC) upholding the authorization by the South Carolina Department of Health and Environmental Control (DHEC) of coverage for certain land-disturbing activities under a State General Permit. We affirm.

FACTS AND PROCEDURAL HISTORY

Respondent Roper Pond, LLC (Roper) is the owner and developer of 12.75 acres of real property on Trenholm Road in an unincorporated area of Richland County. The property includes 1.8 acres consisting of wetlands and waters that were identified by the United States Army Corps of Engineers (Corps) in 2005 as falling under the jurisdiction of the Federal Clean Water Act (CWA).¹ These jurisdictional wetlands include Roper Pond, a man-made pond that is visible from Trenholm Road but wholly within the boundaries of Roper's property. Before implementation of the project at issue in this appeal, water lilies covered the surface of Roper Pond.

Roper Pond drains through a pipe that runs beneath Trenholm Road and into Cary Lake. Cary Lake is privately owned by the Cary Lake Homeowners Association, which is not a party to this litigation. Although Cary Lake lies partly within the boundaries of the Town, the Town has no ownership interest in it and is not responsible for its maintenance or remediation.

In August 2007, Roper submitted to the Corps its initial plans for a multifamily apartment development to be built on its property. As part of this undertaking, Roper needed a permit for stormwater discharges from land-disturbing activities associated with the project. *See* S.C. Code Ann. § 48-14-30(A) (2008) (prohibiting land-disturbing activities without the submission of a stormwater management and sediment control plan to the appropriate agency and a permit to proceed with these activities); 9 S.C. Code Ann. Regs. 72-305 (Supp. 2012) (stating similar

¹ 33 U.S.C. §§ 1251 *et seq.* (2006).

prohibitions to section 48-14-30(A) and setting out the permit application and approval process).

To expedite matters, Roper could "seek coverage under a promulgated storm water general permit" instead of obtaining an individual permit. *See* 3 S.C. Code Ann. Regs. 61-9.122.26(c)(1) (2012) ("Dischargers of storm water associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated storm water general permit."). Under 3 S.C. Code Ann. Regs. 61-9.122.28 (2012), DHEC is authorized to issue general permits for stormwater discharges from projects that meet certain criteria. Pursuant to this authority, DHEC issued Permit Number SCR100000 (State General Permit) on August 1, 2006. The State General Permit, which DHEC described as an "NPDES General Permit for Storm Water Discharges from Large and Small Construction"² covered discharges from the commencement of an authorized project until final stabilization of the construction site.

In 2006, DHEC published a Guidance Document for the State General Permit advising prospective permittees about the need to obtain necessary permits from the Corps. In this particular case, Roper was required under section 404 of the CWA to obtain a wetlands permit from the Corps because it intended to fill some of the jurisdictional wetlands on the project site. *See* 33 U.S.C. § 1344(a) (2006) (authorizing the Corps to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites").

Under section 404(e) of the CWA, the Secretary of the Army is authorized to issue Nationwide Permits (NWP) for any category of similar activities involving discharges of dredged or fill material determined to "cause only minimal adverse environmental effects when performed separately" and to "have only minimal cumulative adverse effect [sic] on the environment." 33 U.S.C. § 1344(e)(1) (2006). If a proposed activity meets the applicable regional and general conditions for an NWP, application for its authorization can proceed more quickly than it would if the applicant sought an individual permit. On March 12, 2007, the Corps issued NWP 29 and NWP 39, the two NWPs at issue in the present litigation.

² As authorized by the Clean Water Act, the National Pollutant Discharge Elimination System (NPDES) Permit Program controls water pollution by regulating point sources that discharge pollutants into waters of the United States. The program is administered by authorized states, including South Carolina.

NWP 29 applied to residential developments, and NWP 39 applied to commercial and institutional developments.

The requirement for a 404 permit from the Corps in turn triggers a requirement under section 401 of the Clean Water Act for water quality certification that any discharge into navigable waters is consistent with federal and state water quality standards (401 certification). 401 certification is required "from the State in which the discharge originates or will originate." 33 U.S.C. § 1341(a)(1) (2006).³ On May 11, 2007, pursuant to its regulatory authority, DHEC issued 401 certifications for projects covered under NWP 29 and NWP 39.⁴ DHEC 401 certifications for all NWPs included general conditions that a given project must meet, including the requirement that DHEC, in reviewing a project for which coverage under an NWP is sought, would consider not only the land area directly impacted by each NWP request, but also impacts to adjacent water bodies or wetlands resulting from the activity.

On April 30, 2008, George Whatley, a wetland scientist for BP Barber, submitted a joint federal and state application for the proposed construction project on Roper's property. On the application, Whatley noted the project would involve the filling of 0.075 acres of jurisdictional wetlands.⁵ On May 5, 2008, Whatley submitted a

³ DHEC regulations reference this requirement as well. *See* 8 S.C. Ann. Regs. 61-101.A.2 (2012) (stating federal law requires an applicant for a federal permit to conduct an activity that "during construction or operation may result in any discharge to navigable waters" "to first obtain a certification from [DHEC]" and stating that "Federal law provides that no Federal license or permit is to be granted until such certification is obtained").

⁴ *See* 8 S.C. Code Ann. Regs. 61-101.A.3 (2012) ("[DHEC] may issue, deny, or revoke general certifications for categories of activities or for activities specific in Federal nationwide or general dredge and fill permits pursuant to Federal law or regulations."); 33 C.F.R. § 330.4(c)(1) (2013) ("State 401 water quality certification pursuant to section 401 of the Clean Water Act, or waiver thereof, is required prior to the issuance or reissuance of NWPs authorizing activities which may result in a discharge into waters of the United States.").

⁵ As noted earlier, the CWA requires a 404 permit for certain discharges of dredged or fill material into navigable waters. The term "navigable waters" is

pre-construction notification (PCN) to the Corps. In the PCN, Whatley noted: (1) although Roper initially advised the Corps in 2007 that the project would impact 0.099 acres of jurisdictional wetlands, the project was redesigned to reduce impacts to 0.075 acres and (2) "best management practices" (BMPs) would be implemented to ensure that construction activities would not impact jurisdictional areas lying outside the permitted impact areas. Whatley further requested that the Corps review the project for possible coverage under an NWP; however, he did not specify any particular NWP under which the activity would be conducted.

No other impacts to water quality were disclosed on the application; however, according to subsequent e-mails between BP Barber and the Corps, Whatley notified the Corps that the project included lowering the elevation of Roper Pond and the discharge of the soil and sediment from the bottom of the pond into an upland area. According to the e-mails, Whatley inquired whether either of these was an impact to be considered in obtaining approval for the construction, and the Corps advised: (1) lowering the pond was not an impact and (2) excavation of the pond would be exempt from permitting requirements provided the excavated material was "placed in a truck or deposited onto uplands" and there was "[n]o double handling or stockpiling in jurisdictional areas."

Pursuant to the requirements for coverage under the State General Permit, a Stormwater Pollution Prevention Plan (SWPPP) was prepared for the project on June 26, 2008. DHEC reviewed the SWPPP and requested certain revisions.

By letter dated September 9, 2008, the Corps advised Whatley: (1) it reviewed the PCN and determined the proposed activity would "result in minimal individual and cumulative adverse environmental effects and [was] not contrary to public interest"; (2) the activity met the terms and conditions of NWP 39; and (3) for authorization to remain valid, the project had to comply with general conditions of

defined in the CWA as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (2006). The United States Supreme Court has imposed limitations on the inclusion of wetlands, holding that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the [CWA]." *Rapanos v. U.S.*, 547 U.S. 715, 742 (2006) (emphasis in original). In the present case, the parties do not dispute that the 0.075 acres of wetlands to be filled in conjunction with Roper's proposed project were "jurisdictional wetlands" subject to the CWA.

the NWP, regional conditions, and certain special conditions, namely, that Roper obtain and provide the Corps with "all appropriate state certifications and/or authorizations (i.e. 401 Water Quality Certification, Coastal Zone Management Consistency Determination, State Navigable Waters Permit)." Consistent with its usual practice, the Corps sent a copy of the September 9, 2008 letter to DHEC as well as to Whatley.

On September 24, 2008, Roper submitted to DHEC a notice of intent (NOI) to discharge storm water associated with its proposed project, now designated as Roper Pond Apartments, seeking approval from DHEC to have the stormwater discharges covered under the State General Permit.⁶ According to the NOI, the project site was 12.8 acres, of which 9.9 acres would be disturbed by land-clearing activities.

DHEC responded to Whatley by letter dated October 2, 2008, advising it determined that the impacts of the project on water quality would be minimal and that the proposed work would be consistent with the 401 certification issued in 2007 for NWP 39, subject to various conditions not at issue in this appeal.

On November 17, 2008, DHEC staff engineer Jill Stewart e-mailed BP Barber to express various concerns. Among these concerns was information she received that the proposed plans for Roper Pond Apartments included lowering of the water surface elevation of Roper Pond to allow for detention of post-development runoff of stormwater. Stewart inquired whether the dropping of the water surface elevation should be taken into account in determining if a site is eligible for coverage under NWP 39. BP Barber responded the following day, informing Stewart that its wetlands consultant advised "the lowering of the water surface elevation is included and covered under [NWP 39]."

In December 2008, DHEC issued a letter acknowledging it was satisfied that the revised SWPPP met the requirements of the State General Permit and the applicable regulations. On December 15, 2008, DHEC staff granted Roper coverage under the State General Permit for its stormwater discharges associated with construction of Roper Pond Apartments.

⁶ The NOI was on a DHEC form entitled "Notice of Intent (NOI) for Stormwater Discharges from Large and Small Construction Activities, NPDES General Permit SCR100000."

By letter dated December 30, 2008, Appellants and other individuals requested that the DHEC Board review and overturn the decision.⁷ Among the technical issues raised in the letter were Roper's failure to disclose its intent to lower the elevation of Roper Pond and an allegation that it sought coverage under the wrong NWP. On January 14, 2009, DHEC responded to the letter, informing Appellants that the Board declined to conduct a final review conference and that anyone aggrieved by the decision could request a contested case hearing in the ALC. On February 16, 2009, Appellants filed a request for a contested case hearing in the ALC.

Meanwhile, on January 6, 2009, Whatley e-mailed the Corps requesting a corrected letter indicating the impacts of the project would be covered under NWP 29 instead of NWP 39. As noted earlier, Whatley also recounted Roper's plans to lower the elevation of Roper Pond and its intent to remove the excavated material to an upland area and his understanding that Roper did not need approval from the Corps for these activities. By letter to Whatley dated February 25, 2009, the Corps advised that it determined the proposed activity would result in minimal individual and cumulative adverse environmental effects, would not be contrary to the public interest, and met the terms and conditions of NWP 29. Except for the particular NWP referenced, the language in the February 25, 2009 letter was identical to the corresponding language in its September 9, 2008 letter.

As it did with the September 9, 2008 letter, the Corps sent a copy of its February 25, 2009 verification letter to DHEC. DHEC, however, did not issue another authorization letter advising Roper that the project would be consistent with the 401 certification issued in 2007 for NWP 29. According to Charles Hightower, DHEC's Section Manager of the 401 Wetlands Section, the purpose of such notification from DHEC is to provide an applicant assurance that the applicant's proposed project falls within the conditions of DHEC's 401 certification. Hightower further testified that Roper's proposed fill of the 0.075 acres of jurisdictional wetlands satisfied the necessary conditions to receive 401 water quality certifications for both NWP 29 and NWP 39 and that because the requisite conditions had been met, Roper did not need to notify DHEC before proceeding with the project under NWP 29.

On June 17, 2009, in response to a motion by Roper to dismiss Appellants' request for a contested case hearing, the ALC issued a consent order in which the parties

⁷ Additional facts about Appellants will be presented in the LAW/ANALYSIS section of this opinion.

agreed to the dismissal of all claims raised by Appellants challenging the 401 certification and authorization to conduct activities under NWP 39 for the proposed development. The partial dismissal did not affect Appellants' claims and Roper's defenses in connection with the 401 certification and authorization under NWP 29 .

The contested case hearing before the ALC took place on September 3 and 4, 2009. Stewart, Hightower, Whatley, and several individual Appellants testified. The record on appeal also includes depositions from various individuals, including Stewart and Hightower. In addition, Appellants called Seth Reice, Ph.D., a professor of ecology and biology at the University of North Carolina at Chapel Hill, as an expert on aquatic ecology. Although Reice admitted he previously opined that the proposed excavation of the Pond would have disastrous consequences, he now admitted this was only conjecture. Furthermore, Reice's primary interest was sedimentation, and he admitted he had no direct experience with excavation. When asked if he believed the land-disturbing activities conducted in conjunction with Roper Pond Apartments would have an adverse impact on Roper Pond, Reice stated only that "[i]t doesn't sound good" and he would "be surprised if they didn't," but declined to offer an expert opinion about the probable results. On cross-examination, Reice also stated he was not provided copies of Roper's SWPPP and except for what he heard at the hearing, had no knowledge of the BMPs that Roper intended to follow in order to minimize the impact of its construction activities.

On January 21, 2010, the ALC issued a final order upholding DHEC's approval of coverage under the State General Permit on the merits and further finding that Appellants lacked standing to challenge DHEC's decision. On March 23, 2010, following a hearing on a motion for stay by Appellants, the ALC temporarily stayed its final order pending a decision on Appellants' motion for reconsideration.

By order dated April 1, 2010, the ALC denied Appellants' motion to reconsider and lifted the temporary stay. Appellants then filed their notice of appeal to this court.

ISSUES⁸

⁸ The Home Builders Association of South Carolina has filed an *amicus curiae* brief asserting that Appellants seek to add an unnecessary step in stormwater regulation and nationwide permitting that would have adverse consequences for

I. Did the ALC err in finding Appellants lacked standing to challenge DHEC's decision to authorize coverage for Roper Pond Apartments under the State General Permit?

II. Did the ALC err in holding the 401 certification issued by DHEC was sufficient for a valid 404 permit and coverage under the State General Permit?

III. Did the ALC err in holding that Roper's proposed stormwater control activities could be covered under the State General Permit?

STANDARD OF REVIEW

The standard of review that an appellate court is to apply to appeals from the ALC is set forth in the South Carolina Administrative Procedures Act (APA), specifically in section 1-23-610 of the South Carolina Code (Supp. 2012). *Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 194 (2012). Under section 1-23-610(B), a reviewing court may reverse or modify a decision by the ALC if the substantive rights of the appellant have been prejudiced because of a finding, conclusion, or decision that: (1) violates constitutional or statutory provisions; (2) exceeds the agency's statutory authority; (3) is made upon unlawful procedure; (4) is affected by other error of law; (5) is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) is arbitrary, capricious, or characterized by either abuse of discretion or clearly unwarranted exercise of discretion. Section 1-23-610 has been applied not only to findings by the ALC on the merits of a controversy but also to findings by the ALC concerning a party's standing to maintain an action. *See Bailey v. S.C. Dep't of Health & Envtl. Control*, 388 S.C. 1, 4-8, 693 S.E.2d 426, 428-30 (Ct. App. 2010) (referencing only the APA in stating the standard of review, but ultimately affirming the ALC on the ground that appellant lacked

the construction industry, the housing market, and the public at large and that existing programs and regulations sufficiently protect the public interest in the permitting process. Because our rulings on the issues Appellants have presented are dispositive of this appeal, we decline to address these policy concerns. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when its disposition of a prior issue is dispositive of the appeal).

standing and declining to address appellant's remaining arguments), *cert. denied* (July 7, 2011).

LAW/ANALYSIS

I. Standing

Appellants in this case are: (1) the Town; (2) various residents of Kaminer Station, a subdivision adjacent to and uphill from Roper Pond (Kaminer Station Appellants);⁹ and (3) various individuals whose properties border Cary Lake (Cary Lake Appellants).¹⁰ The ALC found none of these groups had standing to maintain this action. We agree.

"Standing to sue is a fundamental requirement in instituting an action." *Bodman v. State of S.C.*, Op. No. 27248 (S.C. Sup. Ct. filed May 8, 2013) (Shearouse Adv. Sh. No. 21 at 27, 31) (quoting *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999)). "When no statute confers standing, the elements of constitutional standing must be met." *Youngblood v. S.C. Dep't of Soc. Servs.*, ___ S.C. ___, ___, 741 S.E.2d 515, 518 (2013).¹¹

In *Sea Pines Association for Protection of Wildlife, Inc. v. South Carolina Department of Natural Resources*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001), the Supreme Court of South Carolina, quoting *Lujan v. Defenders of Wildlife*, 504

⁹ The Kaminer Station Appellants are Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Toney Sinclair, Aaron Small, and Bette Small.

¹⁰ The Cary Lake Appellants are Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown.

¹¹ The ALC did not consider whether the "public importance" exception could confer standing on any of the Appellants, and Appellants have not raised this exception in their brief. See *Davis v. Richland Cnty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007) ("[S]tanding may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.").

U.S. 555, 560-61 (1992), set forth three requirements that must be met to satisfy "the irreducible constitutional minimum of standing":

First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not "conjectural" or "hypothetical." Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

(Citations omitted).

"The party seeking to establish standing carries the burden of demonstrating each of the three elements." *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice" to withstand a motion to dismiss. *Lujan*, 504 U.S. at 561. Elements of standing, however, "are not mere pleading requirements but rather an indispensable part of the plaintiff's case"; therefore, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stage of the litigation." *Id.* (quoted in *Beaufort Cnty. v. Trask*, 349 S.C. 522, 528 n.14, 563 S.E.2d 660, 663 n.14 (Ct. App. 2002)).

A. The Town

The ALC found the Town did not satisfy the first element required to establish standing, namely, that it had a personal stake in the litigation. Quoting *Glaze v. Grooms*, 324 S.C. 249, 255, 478 S.E.2d 841, 845 (1996), the ALC referenced the general rule that "a municipality must allege an infringement of its own proprietary interests or statutory rights to establish standing." In response to this statement, Appellants advocate a broad interpretation of the term "proprietary interest" in determining whether the Town has demonstrated an injury in fact sufficient to confer standing. In the present case, Appellants argue "proprietary interests" include: (1) the Town's interest in protecting the environmental quality of Cary

Lake, which lies partly within the Town borders; (2) the Town's ability to comply with federal law, such as NPDES regulations; (3) the Town's interest in maintaining its character and desirable attributes, including its aesthetic appeal; and (4) the diminution of property values within the Town and other adverse effects of a nearby apartment complex on such concerns as security and traffic congestion. We hold that none of these professed interests, whether "proprietary" or not, are sufficient to confer standing on the Town in this case.

As to the first two concerns, Town Mayor Richard Thomas testified in a deposition that the Town had no ownership interest in Cary Lake. Mayor Thomas gave a brief statement that under NPDES regulations, the Town was responsible for water that flowed out of Cary Lake, but provided no supporting authority for this assertion.¹² Moreover, he acknowledged the Town is not responsible for the maintenance of Cary Lake, has never allocated funds for this purpose, and has never incurred any fines under NPDES regulations despite alleged problems in the past with water flowing into Cary Lake. He also stated that Cary Lake is the "bottom lake," that is, the final lake into which the remaining six lakes flow. We also find significant the absence of any evidence from Appellants that the BMPs to be implemented under the SWPPP were inadequate to prevent sediment from leaving the construction site; thus, Appellants have also failed to show their alleged injuries are "fairly traceable" to the challenged action in this case. Similarly, Appellants have not shown any causal connection between the authorization of coverage to Roper for land-disturbing activities under the State General Permit and either of their two remaining concerns. Therefore, pursuant to section 1-23-610, we affirm the ALC's determination that the Town lacks standing.

¹² In their reply brief, Appellants cite title 33, section 1342(p) of the United States Code (2006), which the United States Congress added to the CWA in 1987. This section covers municipal and industrial stormwater discharges. Under paragraph (4) of this section, the Administrator of the Environmental Protection Agency is required to establish regulations setting forth permit application requirements for discharges from municipal separate stormwater systems and either the Administrator or appropriate State agency would eventually acquire the authority to issue and deny such permits. We have found nothing in this section either requiring a municipality to obtain a permit for stormwater discharges from a stormwater system that is already covered by a permit or holding a municipality responsible for such discharges.

B. Kaminer Station Appellants

The ALC found the Kaminer Station Appellants failed to establish either an injury in fact from the permitting decision or a causal connection between the challenged decision and their alleged injuries. We agree with the ALC to the extent that it found that Appellants have failed to establish any injury that would be traceable to the permitting decision.

Linda Jackson, one of the Kaminer Station Appellants, conceded that "water flows down" and there was no serious concern that stormwater from Roper Pond would flow uphill to Kaminer Station. However, Jackson also described the visual appeal of Roper Pond and her appreciation of the nature sounds in the area. She also testified that she had fished on Cary Lake and had seen changes for the worse in that area as it developed. Such observations, even if shared by many others, arguably can still form the basis for a concrete and particularized injury that would confer standing. *See Pye v. U.S.*, 269 F.3d 459, 469 (4th Cir. 2001) ("[M]erely because an injury is widely held does not necessarily render it abstract and thus not judicially cognizable. . . . So long as the plaintiff himself has a concrete and particularized injury, it does not matter that legions of other persons have the same injury."). Moreover, even those concerns reflecting aesthetic or recreational interests have been recognized as "judicially cognizable injur[ies] in fact." *Sea Pines*, 345 S.C. at 602, 550 S.E.2d at 292. Nonetheless, when such interests involve property that is privately owned by a party other than the plaintiff, the presence of an injury in fact cannot be assumed. *Cf. Conservation Council of N.C. v. Costanzo*, 505 F.2d 498, 501-02 (4th Cir. 1974) (stating the plaintiffs' recreational use of privately owned property as either licensees or trespassers did not confer standing to challenge development on that property because there was no evidence that the owner of the property would allow such use to continue in the future). Here, the affected bodies of water, Roper Pond and Cary Lake, are privately owned by parties other than Appellants.

Furthermore, we hold substantial evidence supports the ALC's determination that the Kaminer Station Appellants have not established a causal connection between their alleged injuries and the conduct giving rise to their complaint. When Roper's attorney asked Jackson to explain the injuries she would suffer if the land-disturbing activities for which coverage under the State General Permit was granted were managed properly, she responded only that "we don't know how it's going to be managed." Jackson also conceded that much of her dissatisfaction with prior construction in the area was due to violations of the applicable permits

rather than the permits themselves. Furthermore, Reice's inability to offer a definitive opinion about the impact of the dredging of the pond supports the ALC's finding that the Kaminer Station Appellants have failed to meet the second requirement for standing.

C. Cary Lake Appellants

Finally, we agree with the ALC that the Cary Lake Appellants failed to show that granting coverage for Roper Pond Apartments under the State General Permit would cause an actual or imminent injury and therefore lacked standing to challenge DHEC's decision to grant coverage under the State General Permit.

Testifying for the Cary Lake Appellants, Elaine Starr stated her home, where she has lived since 1971, borders Cary Lake, which is on the opposite side of Trenholm Road from Roper Pond. She further testified that she had a bachelor's degree in biology and had done graduate work in wetlands and coastal resources. She had participated in several organizations that were concerned with water quality, and she and her family have made extensive use of Cary Lake for recreational purposes. Starr testified about her empirical observations of the decline in the water quality of Cary Lake and how these observations were supported by her use of a Secchi disk, a technique to measure water clarity. She also expressed concerns about the possible demise of the water lilies due to the dredging of Roper Pond, noting "if their [rhizomes] or root systems get damaged or taken away, . . . they may not be there."

According to Starr, the increased sedimentation in Cary Lake that she described resulted from prior occurrences involving possible mismanagement. However, there was no evidence that the project at issue here would lead to similar results. Starr admitted she had not reviewed the SWPPP for the proposed project and was unable to offer any specific challenge to DHEC's determination that the SWPPP was not, under the terms of the State General Permit, a sufficient precaution against the consequences she claimed would result from the building of Roper Pond Apartments. Finally, similar to what we noted in our discussion about the Kaminer Station Appellants, the complaints of the Cary Lake Appellants primarily concern Roper Pond and Cary Lake, both of which are privately owned and maintained by parties other than Appellants, and are thus not injuries in fact. We therefore agree with the ALC that the Cary Lake Appellants presented at best only speculative evidence that they would suffer an injury in fact from DHEC's decision to allow Roper Pond Apartments to be covered under the State General Permit.

II. Validity of the 401 Certification

Appellants further argue the 401 certification issued by DHEC was insufficient to satisfy the requirements Roper needed to fulfill to obtain a 404 permit because: (1) the 401 certifications that DHEC issued for projects authorized under NWP 29 or NWP 39 could not apply to the excavation of the pond because that activity was not disclosed when Roper applied to the Corps for a 404 permit; (2) the project did not comply with certain general conditions applicable to all NWPs, specifically that DHEC consider the impacts to all land within a project boundary and to adjacent bodies of water or wetlands; (3) DHEC never issued a formal certification that the project met the conditions under NWP 29 for water quality certification; and (4) DHEC failed to conduct the required review for compliance with certain water quality regulations. We hold none of these allegations warrant reversal of the ALC's finding that Roper had an effective 401 certification for its proposed project.

First, although Roper did not initially inform the Corps that it intended to dredge and excavate the pond as part of the project, as of January 6, 2009, when Whatley requested a corrected letter from the Corps indicating that the impacts of the project would be covered under NWP 29 instead of NWP 39, the Corps had been informed that such an activity was to be part of the project. Having received this information, the Corps nevertheless determined that the project would result in "minimal individual and cumulative environmental effects" and met the conditions of NWP 29.

As to Appellants' second argument, we agree with their position that the general conditions for water quality certification require DHEC to review the "overall project proposed by a single owner/developer," "includes all land within the project bound under single ownership," and is not confined to "the land area directly impacted by each NWP request" and their assertion that no one at DHEC undertook a complete examination of the impact of the project on all waters and wetlands at the project site or determined if feasible alternatives were available. Here, however, 401 certification was necessary only as a prerequisite to obtaining a 404 permit from the Corps for filling the jurisdictional wetlands. This requirement was pursuant to 33 U.S.C. section 1341(a)(1) (2006), which states in pertinent part:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction

or operation of facilities, *which may result in any discharge into the navigable waters*, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, . . . that any such discharge will comply with the applicable provisions

(emphasis added). Appellants have emphasized they never argued that a 404 permit was necessary to dredge and excavate the pond, and there was no contention here that this activity would result in a discharge into a navigable water.

Furthermore, according to their brief, the specific "impacts" that Appellants maintain were overlooked by DHEC pertained only to the pond. As Appellants point out, under DHEC's general conditions, Roper was required to: (1) demonstrate that impacts to wetlands have been avoided and that unavoidable impacts to wetland areas have been minimized; and (2) provide suitable compensation for any unavoidable impacts. Roper, as the owner of the property on which the pond is located, would be the proper party to object to impacts that have not been avoided or minimized and to enforce compensation for any unavoidable impacts. In other words, Roper would be placed in the illogical position of having to complain about its own project or to demand compensation from itself.

Based on our interpretation of the events in this case, we disagree with Appellants' third argument, their assertion that the project never received a proper water quality certification for coverage under NWP 29. We acknowledge Hightower admitted that after DHEC received notice from the Corps that the project would be covered under NWP 29, it did not issue a letter advising Roper that the project would be consistent with the 401 certification it issued for this NWP and agreed that sending such a letter would have been advisable; however, he also testified that an authorization letter was only a formality for the applicant's benefit and was not required by the State General Permit. The Corps verified that Roper's proposed work was eligible for coverage under NWP 29, and DHEC, consistent with its regulatory authority, had already issued a 401 certification for projects covered under NWP 29. A follow-up letter would have served only as documentation of this certification, and the absence of such a letter does not mean DHEC failed to issue a water quality certification for the project.

Finally, Appellants have challenged the water quality certification on the ground that DHEC failed to review the project to determine: (1) whether it complied with

6 S.C. Code Ann. Regs. 61-68 (2012) and 8 S.C. Code Ann. Regs. 61-101 (2012), both of which were promulgated pursuant to the South Carolina Pollution Control Act; and (2) the impact of the draining and excavation of Roper Pond. They further argue the ALC erroneously relied on *Responsible Economic Development v. South Carolina Department of Health and Environmental Control*, 371 S.C. 547, 552-53, 641 S.E.2d 425, 428 (2007), for the proposition that "a stormwater permit issued pursuant to the Stormwater Act cannot be denied based on the regulations of the Pollution Control Act." We need not determine whether the ALC correctly applied this holding. We have already determined that the Corps was aware that Roper intended to excavate the pond when it authorized coverage under NWP 29 and that the 401 certification that DHEC issued for this NWP 29 satisfied the water quality certification requirement for a 404 permit.

III. Coverage Under the State General Permit

Finally, Appellants take issue with the finding that Roper was entitled to coverage under the State General Permit. They submit two arguments in support of their position. We reject both arguments.

First, Appellants reiterate their previous argument that Roper was not entitled to coverage because the 401 certification was inadequate for a 404 permit, which in turn was a prerequisite for coverage under the State General Permit. We have already determined that the 401 certification that DHEC issued was sufficient for Roper to obtain coverage under NWP 29.

Appellants further contend that the excavation of the pond and lowering of its surface would make the pond a water control structure and would therefore require, under the terms of the State General Permit, a 404 permit from the Corps, which in turn would require a 401 certification. The ALC did not specifically address the question of whether the use of the pond as a water control structure required a 404 permit, and Appellants did not request a ruling in their motion to reconsider. The issue, then, has not been preserved for appellate review, and it would be improper for us to address it now. *See Shealy v. Aiken Cnty.*, 341 S.C. 448, 460, 535 S.E.2d 438, 444-45 (2000) (holding an issue was not preserved for appeal because the trial judge's general ruling was insufficient to preserve the specific issue for appellate review and the appellant did not move to alter or amend the judgment pursuant to Rule 59(e), SCRCP); *Hendrix v. Eastern Distribution, Inc.*, 320 S.C. 218, 218, 464 S.E.2d 112, 113 (1995) (vacating an opinion by this court "to the extent it addressed an issue which was not preserved").

CONCLUSION

We agree with the ALC that none of the Appellants had standing to maintain their challenge to the authorization of coverage for Roper Pond Apartments under the State General Permit. As to the merits of Appellants' arguments, we affirm the ALC's ruling that Roper is entitled to this coverage.

AFFIRMED.

WILLIAMS and LOCKEMY, JJ., concur.

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown,

Petitioners,

vs.

South Carolina Department of Health and Environmental Control and Roper Pond, LLC,

Respondents.

Docket No. 09-ALC-07-0069-CC

ORDER

FILED

MAY 11 2010

SC ADMIN. LAW COURT

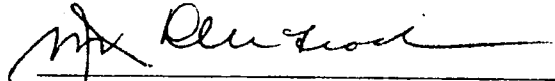
This matter comes before the Court on Respondent Roper Pond, LLC's Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPALE ("Petition for Attorneys' Fees") filed on April 19, 2010.

On April 20, 2010, Petitioners filed and served a Notice of Appeal of the Court's decision on the merits in this case. The parties agree to hold the Petition for Attorneys' Fees in abeyance pending the final resolution of Petitioners' appeal. The parties acknowledge and agree that the Petition for Attorneys' Fees pursuant to S.C. CODE ANN. § 15-77-300 and Rule 72, SCRPALE, was timely filed. The Petitioners agree that for purposes of this order, they do not contest the Court's jurisdiction to hear the Petition at the time of filing. The parties agree that Roper Pond, LLC's petition for fees and costs associated with the litigation of the matter before this Court is preserved for determination by the Court upon the final resolution of the appeal on the merits. The parties further agree that within thirty (30) days of the final resolution of the appeal of the merits of this case, Respondent Roper Pond, LLC, may file a revised Petition for Attorneys' Fees and supporting affidavits to include the fees and costs incurred by Roper Pond, LLC during the appeal before the Court of Appeals. Any party may also file such petitions or motions the party may deem appropriate, and all parties shall have the right to raise such issues or defenses as they deem appropriate; no waiver is intended by this order. Within thirty (30) days of Respondent

Roper Pond, LLC's filing of a revised Petition for Attorneys' Fees, the other parties shall file their responses to such Petition.

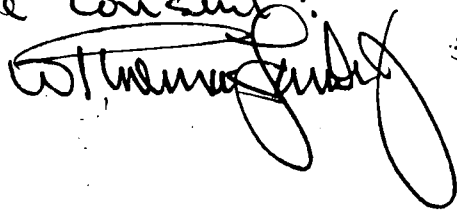
IT IS HEREBY ORDERED that Respondent Roper Pond, LLC's Petition for Attorneys' Fees is held in abeyance pending the final resolution of Petitioners' appeal of the decision on the merits in this matter.

AND IT IS SO ORDERED.

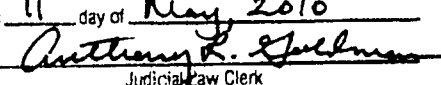

John D. McLeod, Judge
South Carolina Administrative Law Court

May 11, 2010

Columbia, South Carolina

We consent:
 5/11/10

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 11 day of May, 2010
By: 
Judicial Law Clerk

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW JUDGE DIVISION**

Town of Arcadia Lakes, Robert L. Jackson,
Linda Z. Jackson, Robert E. Williams, Barbara
S. Williams, Elizabeth M. Walker, Louis E.
Spradlin, Mary Helen Spradlin, Thomas Hutto
Utsey, Tony Sinclair, Aaron Small, Bette
Small, Gene F. Starr, M.D., Elaine J. Starr,
Sanford T. Marcus, Ruth L. Marcus, and
Steven Brown,

Petitioners,

vs.

South Carolina Department of Health and
Environmental Control and Roper Pond, LLC,

Respondents.

Docket No. 09-ALC-07-0069-CC

**ORDER DENYING MOTION TO
RECONSIDER AND FOR STAY**

FILED

APR 01 2010

SC ADMIN. LAW COURT

This matter comes before the Court on Petitioners' Motion to Reconsider and for Stay ("Motion") of a Final Order and Decision issued in this case on January 21, 2010. On February 16, Respondent Roper Pond, LLC ("Roper Pond") filed a response in opposition to the Motion. Pursuant to an Order dated March 3, 2010, a hearing on the Motion was held on March 23, 2010, in Columbia, South Carolina. On March 23, 2010, the Court issued an Order for Temporary Stay imposing a stay of the Final Order and Decision pending the ruling on the Motion.

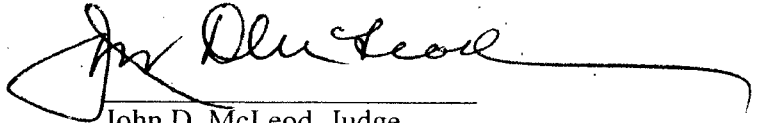
The Administrative Law Court reviews a Motion for Reconsideration consistent with the grounds to alter or amend a final decision as set forth in Rule 59, SCRCP. Rule 29(D), SCRPALC. Having heard the arguments of the parties, I find that the Petitioners have not put forth sufficient grounds for a reconsideration of the Final Order and Decision in this matter.

Section 1-23-380 of the APA provides that this Court may grant a stay of a final order "upon appropriate terms, upon the filing of a petition under Rule 65 of the South Carolina Rules of Civil Procedure." S.C. CODE ANN. § 1-23-380(2) (Supp. 2009). To establish a cause of action for a preliminary injunction under Rule 65, a party must show "(1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." *Scratch Golf Co. v. Dunes W. Residential Golf Props.*,

Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004). A plaintiff must establish all three elements to obtain a preliminary injunction. *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 51, 674 S.E.2d 505, 509 (Ct. App. 2009). Having heard the arguments of the parties, I find that the Petitioners failed to satisfy these requirements for a stay of the Final Order and Decision issued on January 21, 2010.

IT IS HEREBY ORDERED that Petitioners' Motion to Reconsider and for Stay is denied. It is further ordered that the stay imposed pursuant to the Order for Temporary Stay dated March 23, 2010 is lifted.

AND IT IS SO ORDERED.


John D. McLeod, Judge
S.C. Administrative Law Court

April 1, 2010
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 1 day of April, 2010
By: Anthony R. Goldman
Judicial Law Clerk

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Town of Arcadia Lakes, Robert L.)
Jackson, Linda Z. Jackson, Robert E.)
Williams, Barbara S. Williams, Elizabeth)
M. Walker, Louis E. Spradlin, Mary)
Helen Spradlin, Thomas Hutto Utsey,)
Tony Sinclair, Aaron Small, Bette Small,)
Gene F. Starr, M.D., Elaine J. Starr,)
Sanford T. Marcus, Ruth L. Marcus, and)
Steven Brown,)

Petitioners,)

vs.)

South Carolina Department of Health and)
Environmental Control and Roper Pond,)
LLC,)

Respondents.)

Docket No. 09-ALC-07-0069-CC

FINAL ORDER AND DECISION

FILED

JAN 21 2010

SC ADMIN. LAW COURT

Appearances:

James S. Chandler, Jr., Esquire
Amy E. Armstrong, Esquire
For Petitioners

Stephen P. Hightower, Esquire
Roger P. Hall, Esquire
For Respondent South Carolina Department of Health and
Environmental Control

W. Thomas Lavender, Jr., Esquire
Joan W. Hartley, Esquire
For Respondent Roper Pond, LLC

This matter comes before the Administrative Law Court pursuant to S.C. CODE ANN. § 1-23-310 *et seq.* (Supp. 2008) and the S.C. CODE ANN. § 44-1-60 (Supp. 2008), for a contested case hearing regarding the South Carolina Department of Health and Environmental Control's

("Department") decision to authorize Respondent Roper Pond, LLC ("Roper Pond") coverage for land-disturbing activities in connection with the construction of a multi-family residential development on Trenholm Road in Richland County ("Proposed Project") pursuant to Permit No. SCR100000, issued August 1, 2006, and entitled NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities. Pursuant to notice given to all parties, a hearing was held before the ALC in this matter on September 3 and 4, 2009, in Columbia, South Carolina. After carefully weighing all the evidence, I uphold the Department's approval of coverage under the General Permit for discharge of stormwater in connection with the Proposed Construction.

I. ISSUES

1. Do the Petitioners have standing to challenge the Department's issuance of coverage under the General Permit for the Proposed Project?
2. Does Roper Pond have an effective 404 Permit for impacts to the jurisdictional wetlands associated with the Proposed Project?
3. Does Roper Pond have all necessary permits and certifications for the excavation of the Pond?
4. Did the Department's grant of coverage under the General Permit violate State water quality standards?

II. FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing conducted on September 3 and 4, 2009, and taking into consideration the burden of persuasion and credibility of the witnesses, I make the following findings of fact by a preponderance of the evidence:

The Proposed Project

1. Roper Pond is the owner of approximately 13 acres of real property on Trenholm Road in an unincorporated area of Richland County ("Property"). The Property includes 1.80 acres of jurisdictional wetlands and a pond ("Pond"), the surface of which is currently

substantially covered with lily pads and duckweed. Roper Pond plans to redevelop the Property as a multi-family residential development.

2. The Pond drains through a pipe which runs beneath Trenholm Road and into Cary Lake, a privately-owned lake, a portion of which lies within the Town of Arcadia Lakes. (30(b)(6) Deposition of Town of Arcadia Lakes, hereinafter "Town Dep.," p. 44, ll. 11-15). The Property is not within the incorporated limits of the Town of Arcadia Lakes. (Town Dep., p. 83).
3. By letter dated December 15, 2008, the Department granted Roper Pond coverage under the General Permit for stormwater discharges associated with construction of the Proposed Project. This coverage under the General Permit authorized land-disturbing activities on 9.6 acres in association with construction of the Proposed Project.
4. On December 30, 2009, Petitioners Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown ("Petitioners") requested review by the South Carolina Board of Health and Environmental Control of the issuance of the authorization to discharge under the General Permit. By letter dated January 14, 2009, the Clerk of the Board notified Petitioners that the Board had decided not to conduct a review conference as requested. On February 16, 2009, Petitioner filed a Request for Contested Case Hearing.
5. Petitioners are the Town of Arcadia Lakes, residents of Kaminer Station, a residential subdivision which borders the Roper Pond Property, and residents of the Cary Lake subdivision.
6. The Property is outside of the corporate limits of the Town of Arcadia Lakes ("Town"). (Tr. p. 249, ll. 20-23). The Town contends that the Department's authorization of coverage under the General Permit to Roper Pond will cause the Town the following harm: harm to the water draining from Roper Pond to Cary Lake, harm to the aesthetic interest of the Town, and harm to the environmental interests of the Town. (Town Dep.,

p. 41, l. 11 - p. 42, l. 8). Cary Lake is privately owned by the Cary Lake Homeowners Association. (Town Dep., p. 43, l. 22 - p. 44, l. 9). The Town has no ownership interest in Cary Lake. (Town Dep., p. 44, ll. 1-4). The water from Cary Lake does not drain into any other water body within the corporate limits of the Town. (Town Dep., p. 44, l. 19 - p. 45, l. 10). The Town is in no way responsible for the maintenance or remediation of Cary Lake. (Town Dep., p. 46, l. 24 - p. 49, l. 15). The Town does not now have and has never had Town funds budgeted for the remediation of Cary Lake. (Town Dep., p. 46, l. 24 - p. 49, l. 15). The Town has never budgeted any funds for the remediation or maintenance for any of the seven lakes within its corporate limits. (Town Dep., p. 49, l. 16 - p. 50, l. 3).

7. The Kaminer Station Subdivision is adjacent to the Roper Pond Property and upgradient of the Roper Pond Property. (Tr. p. 241, l. 22 - p. 242, l. 10; p. 256, l. 11 - p. 257, l. 2). Linda Jackson, a resident of the Kaminer Station Subdivision, testified that she enjoys the view of the Pond on the Roper Pond Property and Cary Lake during walks in the area. (Tr. p. 243, l. 1 - p. 246, l. 15). Ms. Jackson further testified Cary Lake is privately owned, and there is no public access to Cary Lake. (Tr. p. 254, ll. 8-23). Ms. Jackson testified that any negative impacts to Cary Lake would be the result of Roper Pond's failure to follow the General Permit and the SWPPP during the construction of the Proposed Project. (Tr. p. 250, l. 16 - p. 251, l. 7).
8. Cary Lake is on the opposite side of Trenholm Road from the Roper Pond Property. (Tr. p. 263, ll. 18-23). Elaine Starr, a resident of the Cary Lake subdivision, testified that she and her family use the lake for swimming, boating, and fishing. (Tr. p. 264, ll. 6-13). Ms. Starr testified that the condition of Cary Lake has deteriorated over the years. (Tr. p. 264, ll. 6-23). Ms. Starr testified that Cary Lake has been impacted by sediment from previous development in the area. (Tr. p. 277, l. 15 - p. 280, l. 20). Ms. Starr testified that she had not reviewed the stormwater plan for the Proposed Project. (Tr. p. 276, ll. 14-18). Ms. Starr testified that any development in the area would exacerbate the condition of Cary Lake. (Tr. p. 277, ll. 7-23). Ms. Starr further testified that the stormwater from the Proposed Project will negatively impact Cary Lake even if the Stormwater Pollution Prevention Plan (SWPPP) approved by the Department is

implemented as designed. *Id.* Ms. Starr testified that she believed that any increase in density of the Property would have a detrimental impact because the impervious surfaces, such as the roof tops, garages, pavement, and sidewalks, would increase the rate of stormwater runoff. (Tr. p. 277, l. 24 - p. 281, l. 14).

Authorization of Coverage under the General Permit

9. Pursuant to 24 S.C. CODE ANN. REG. § 61-9.122.26 *et seq.* ("NPDES Regulations"), a permit is required for the land-disturbing activities associated with the Proposed Project. 24 S.C. CODE ANN. REG. § 61-9.122.26(c). Section 61-9.122.28(a)(2) of the Regulations authorizes the Department to issue general permits for discharges for categories or subcategories of storm water point sources. S.C. CODE ANN. REGS. § 61-9.122.28(a)(2)(i). On August 1, 2006, the Department re-issued the NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities, Permit No. SCR100000 ("General Permit"). (Pet. Ex. 3). The Department administers the General Permit pursuant to the NPDES Regulations and 26 S.C. CODE ANN. REG. § 72-300 *et seq.* ("Stormwater Regulations"). The General Permit covers discharges from the commencement of construction activities until final stabilization of the construction site. (Pet. Ex. 3, Title Page) (Tr. p. 60, ll. 1-8).
10. On September 24, 2008, Roper Pond filed a notice of intent to discharge stormwater associated with the construction of the Proposed Project under the General Permit. Roper Pond also submitted to the Department a storm water pollution prevention plan ("SWPPP") as required by the General Permit and the Stormwater Regulations. (DHEC Ex. 2). Pursuant to the Stormwater Regulations, the Department may delegate review and approval of the SWPPP to a local government or conservation district. 26 S.C. CODE ANN. REGS. § 72-304(A)(1). Accordingly, Roper Pond's SWPPP was initially submitted to Richland County for review. (Tr. p. 51, ll. 23-25). Prior to the conclusion of Richland County's review, the Department requested transfer of the review to the Department because citizens had expressed concerns about the Proposed Project. (Tr. p. 52, l. 6 – p. 53, l. 9).

11. Jill Stewart, a licensed professional engineer in South Carolina and Manager of the Department's Stormwater Permitting Section, has reviewed and approved over 500 applications for coverage under the General Permit. (Tr. p. 50, ll. 1-2). Neither the General Permit nor the Stormwater Regulations place any limitation on the size of the proposed project which may be covered under the General Permit. (Tr. p. 73, l. 18 – p. 74, l. 1). Ms. Stewart testified that the Department has issued coverage under the General Permit for land-disturbing activities for projects exceeding 200 acres. (Tr. p. 73, ll. 23-24).
12. Under the Stormwater Regulations, the SWPPP must address both quality control and quantity control of the stormwater runoff associated with a proposed project. 26 S.C. CODE ANN. REGS. § 72-307(C). In reviewing a SWPPP, the reviewing entity assesses the proposed best management practices ("BMPs") to determine if those measures are adequate to meeting the requirements of the Stormwater Regulations and the General Permit. The SWPPP for any proposed project can be revised as needed to incorporate the appropriate combination of BMPs and implementation procedures necessary to meet the requirements of the General Permit. (Tr. p. 74, l. 24 – p. 75, l. 8).
13. The SWPPP approved by the Department for the Proposed Project utilized a number of BMPs to control erosion and sedimentation during construction. The plan included a combination of silt fences, berms, and sedimentation basins throughout the site and along the perimeter to control erosion and reduce sediment entering the Pond or leaving the construction site. (Tr. p. 63, l. 7 – p. 64, l. 7). In its review of the SWPPP, the Department requested certain revisions to the SWPPP submitted by Roper Pond. (Tr. p. 57, ll. 3-8). Ms. Stewart testified that the Roper Pond SWPPP, with the requested revisions, complied with the requirements of the General Permit and the Stormwater Regulations. (*Id.*; Tr. p. 58, ll. 16-19; p. 71, ll. 13-17). Ms. Stewart further testified that any impacts from the Proposed Project on Roper Pond or Cary Lake would be the result of a violation of the SWPPP and the conditions of the General Permit, not the authorization for coverage under the General Permit. (Tr. p. 75, ll. 19-25). Once Roper Pond begins construction activities, Section 3.10 of the General Permit requires periodic inspections of the site by a qualified inspector to ensure compliance with the SWPPP.

(Pet. Ex. 3, pp. 17-20; Tr. p. 76, l. 12 – p. 78, l. 16; p. 89, l. 16 – p. 90, l. 1. 19). Copies of the inspection reports are required to be maintained at the construction site. (Pet. Ex. 3, p. 19; Tr. p. 79, l. 6 – p. 81, l. 5).

14. Although coverage under the General Permit terminates once the site is stabilized following the conclusion of construction activities, Section 3.4(F) of the General Permit requires the applicant to include “a description of all post-construction storm water management measures that will be installed during a construction process to control pollutants and storm water after the construction operations have been completed.” (Pet. Ex. 3, p. 15). In its review of the SWPPP, the Department recommended the use of Stormceptors®, devices designed to filter sediment and pollutants from stormwater post-construction. (Tr. p. 60, l. 13 – p. 61, l. 14). Pursuant to the Stormwater Regulations, the SWPPP for a project disturbing more than ten acres requires a removal efficient of 80 percent of suspended solids prior to discharge to a single outlet. 26 S.C. CODE ANN. REGS. § 72-307(C)(5)(b). Even though land-disturbing activities for the Proposed Project will affect fewer than ten acres, Roper Pond’s post-construction stormwater design is designed to achieve a removal efficiency of 80 percent with the installation of the Stormceptors® and thus exceed the regulatory requirements for the authorization under the General Permit. (Tr. p. 67, l. 20 – p. 68, l. 22).
15. The Stormwater Regulations also require an applicant to demonstrate that the development of the site does not create a post-construction stormwater runoff rate that is greater than the pre-construction stormwater runoff rate. 26 S.C. CODE ANN. REGS. § 72-307(C)(4)(a). Roper Pond provided the Department with pre-construction and post-construction runoff rates for the two-year 24-hour duration storm event and the ten-year 24-hour duration storm event in order to demonstrate that the design for development of the site met this regulatory requirement. (Tr. p. 64, l. 15 – p. 65, l. 19). The approved design included dredging the existing Pond and lowering the water level to provide additional storage volume for control of the post-construction runoff rate. (Tr. p. 65, ll. 16-19).

16. Roper Pond's SWPPP incorporated the Pond as a means to satisfy the post-construction runoff rate requirement, not as a means of satisfying the erosion and sediment control requirements of the General Permit and the Stormwater Regulations. (Tr. p. 67, ll. 15-19). Both the General Permit and the Stormwater Regulations allow an existing pond to be used for control of the stormwater runoff rate on a developed site. (Tr. p. 49, ll. 15-25).

Corps Permitting for the Fill of Wetlands

17. Section 2.1(C) of the General Permit provides as follows: "If a US Army Corps of Engineers' 404 Permit is required by Section 404 of the CWA for permanent or temporary storm water control structures, DHEC may not grant coverage under this GCP until the 404 Permit has been issued and is effective." (Pet. Ex. 3, p. 4). On June 30, 2006, the Department published a guidance document for the General Permit to be issued on August 1, 2006 ("Guidance Document"). (Pet. Ex. 22). The Guidance Document noted that the new General Permit included a provision regarding the requirement of a 404 permit for the proposed activities:

Permit advises permittee about US Army Corps of Engineers 404 permit requirement. This requirement is not new, but this is the first time the permit has stated this permit must be obtained prior to issuance of coverage under this permit under certain circumstances. This is an informational item to help the permittee understand what other permits may be required before coverage can be granted.

(Pet. Ex. 22, p. 1). Roper Pond provided the Department with documentation that the fill of 0.075 acres of jurisdictional wetlands was authorized under a Corps 404 Nationwide Permit. (Tr. p. 47, ll. 3-12; p. 48, l. 23 – p. 49, l. 8).

18. The U.S. Army Corps of Engineers ("Corps") administers the permitting program for filling of wetlands under Section 404 of the Federal Clean Water Act, 33 U.S.C.A. §§ 1251 *et seq.*, ("Clean Water Act"). 33 U.S.C.A. § 1344. Pursuant to Section 404 of the Clean Water Act, a Corps permit is required "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C.A. § 1344(a). Section 404 of the Act authorizes Corps to "issue general permits on a State, regional, or

nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.” 33 U.S.C.A. § 1344(e)(1). On March 12, 2007, the Corps published the final decision to re-issue Nationwide Permits, including Nationwide Permit 29 for Residential Developments and Nationwide Permit 39 for Commercial and Institutional Developments, in the Federal Register. 72 FR 11092-01 (11123) (Tr. p. 112, ll. 22-24). Both Nationwide Permit 29 and Nationwide Permit 39 authorizes the fill of up to 0.10 acres of jurisdictional wetlands. (Tr. p. 140, ll. 4-12).

19. Pursuant to 33 C.F.R. § 330.4 of the Corps Regulations, a state water quality certification is required prior to re-issuance of a Nationwide Permit. 33 C.F.R. 330.4(c)(1) (“State 401 water quality certification pursuant to section 401 of the Clean Water Act, or waiver thereof, is required prior to the issuance or reissuance of NWP’s authorizing activities which may result in a discharge into waters of the United States.”). The Department issued its 401 Water Quality Certification for the 2007 Nationwide Permits in accordance with S.C. CODE ANN. REGS. § 61-101 (“Water Quality Certification Regulations”). (Tr. p. 118, l. 12 – p. 119, l. 5). The Department determined that the certification of these Nationwide Permits conformed to the requirements of the Water Quality Certification Regulations because the activities authorized under the Permits would have minimal individual or cumulative impacts. (Tr. p. 118, l. 12 – p. 119, l. 5). Accordingly, in 2007 the Department issued a 401 Water Quality Certification for Nationwide Permit 29 and Nationwide 39 with certain general conditions. (Tr. p. 117, l. 20 – p. 118, l. 11; p. 142, ll. 5-17). Pre-construction notification to the Department is not required under the 401 Water Quality Certifications for either Nationwide Permit 29 or Nationwide Permit 39. (Tr. p. 133, l. 12 – p. 134, l. 1; p. 135, ll. 15-18; p. 143, ll. 1-10).
20. Pursuant to the Corps regulations, some Nationwide Permits require notification to the Corps prior to conducting activities authorized by the Permit. Section 33 C.F.R. § 330.1 of the Corps regulations provides as follows:

In most cases, permittees may proceed with activities authorized by NWP's without notifying the [district engineer ("DE")]. However, the prospective permittee should carefully review the language of the NWP to ascertain whether he must notify the DE prior to commencing the authorized activity. For NWP's requiring advance notification, such notification must be made in writing as early as possible prior to commencing the proposed activity. **The permittee may presume that his project qualifies for the NWP unless he is otherwise notified by the DE within a 30-day period.**

33 C.F.R. 330.1(e)(1) (emphasis added). Accordingly, while certain Nationwide Permits require the permittee to provide Pre-Construction Notification ("PCN") to the Corps, there is no requirement that the Corps provide an affirmative response to the PCN. (See also Tr. p. 338, ll. 16-23). Both Nationwide Permit 39 and Nationwide Permit 29 require the permittee to submit a PCN to the Corps prior to conducting activities under the Permit. (Tr. p. 135, ll. 15-22). The requirement of a Pre-Construction Notification is a Corps requirement and does not require notification to the Department. (Tr. p. 115, ll. 4-25; p. 133, ll. 6-11; p. 135, ll. 15-18; p. 143, ll. 1-10).

21. Corps regulations define wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." 33 C.F.R. § 328.3(b). On January 5, 2005, the Corps issued a jurisdictional determination for the Roper Pond Property, confirming the identification of 1.80 acres of jurisdictional wetlands. (Roper Pond Ex. 6).
22. George Whatley, the wetlands scientist for Roper Pond, worked with the design engineers for the Proposed Project to minimize the impacts to wetlands and to prepare a Corps submittal for authorization to fill jurisdictional wetlands as required by Section 404 of the Clean Water Act. (Tr. p. 299, ll. 1-12). Mr. Whatley has performed over 200 wetland delineations and has obtained approval for more than 250 permits from the Corps. (Tr. p. 298, ll. 13-22).
23. On April 30, 2008, Roper Pond submitted an application to the Corps to fill 0.075 acres of jurisdictional wetlands in association with construction of the Proposed Project. (Pet.

Ex. 9). On May 5, 2008, George Whatley submitted a PCN to fill 0.075 acres of jurisdictional wetlands under a Nationwide Permit. (Roper Pond Ex. 6). The PCN for the Proposed Project did not specify the Nationwide Permit under which the activities would be conducted. (Roper Pond Ex. 6; Tr. p. 309, ll. 1-16).

24. By letter to Mr. Whatley dated September 9, 2008, the Corps verified that “the activity meets the terms and conditions of Department of Army Nationwide Permit(s) #39.” (Pet. Ex. 10). The Corps further advised that the Proposed Project must comply with the following conditions:

1. That prior to beginning the authorized work the permittee must obtain and provide the Corps with a copy of all appropriate state certifications and/or authorizations (i.e. 401 Water Quality Certification, Coastal Zone Management Consistency Determination, State Navigable Waters Permit). If the permittee fails to obtain the necessary state certifications and/or authorizations prior to beginning work, this will be considered a willful knowing violation of the Clean Water Act and appropriate enforcement action will be taken.

(Pet. Ex. 10).

25. The Corps typically copies the Department on its verification of activities to be conducted under a Nationwide Permit. (Tr. p. 150, l. 22 – p. 151, l. 3). On September 11, 2008, the Department received a copy of the September 9, 2008 letter from the Corps to Mr. Whatley. (Pet. Ex. 10). Charles Hightower, Section Manager of the Department 401 Wetlands Section, testified that the fill of 0.075 acres as proposed by Roper Pond conforms to the conditions of the 401 Water Quality Certifications for both Nationwide Permit 29 and Nationwide Permit 39. (Tr. p. 133, ll. 12-20; p. 136, ll. 12-21). By letter dated October 2, 2008, the Department advised Mr. Whatley that the staff had reviewed the Proposed Project and that the Project was consistent with the “401 Water Quality Certification issued for Nationwide Permit Number 39 on May 11, 2007, provided the applicant adheres to all conditions of that certification (see attached).” (Pet. Ex. 12).
26. In early 2009, Mr. Whatley contacted Colt Bowles of the Corps to request clarification on the verification of the PCN for activities under Nationwide Permit 39 for Commercial and Institutional Development instead of Nationwide Permit 29 for Residential

Development. (Roper Pond Ex. 7; Tr. p. 310, l. 20 – p. 312, l. 9). By letter to Mr. Whatley dated February 25, 2009, the Corps verified that the fill of 0.075 acres in association with the Proposed Project was authorized under Nationwide Permit 29. (Roper Pond Ex. 1). As with the verification under Nationwide Permit 39 on September 8, 2008, the Corps further advised that the Proposed Project must comply with the following conditions:

1. That prior to beginning the authorized work the permittee must obtain and provide the Corps with a copy of all appropriate state certifications and/or authorizations (i.e. 401 Water Quality Certification, Coastal Zone Management Consistency Determination, State Navigable Waters Permit). If the permittee fails to obtain the necessary state certifications and/or authorizations prior to beginning work, this will be considered a willful knowing violation of the Clean Water Act and appropriate enforcement action will be taken.

(Pet. Ex. 1). Mr. Whatley testified that the references to other state certifications and authorization are merely provided as examples of other authorizations that may be required for a project. (Tr. p. 339, ll. 7-23). All applicable authorization from the state had already been provided since the only authorization required was the 401 Water Quality Certification for Nationwide Permit 29 issued in 2007. (Tr. p. 339, l. 14 – p. 340, l. 25).

27. The Corps copied the Department on the February 25, 2009 verification letter to Mr. Whatley. *Id.* The Department did not issue another concurrence letter for the Corps' verification of the authorization for the Proposed Project under Nationwide Permit 29. (Tr. p. 117, ll. 2-19). Charles Hightower testified that notification to the Department by the applicant is not required as long as the permittee meets the conditions of the 401 Water Quality Certification for the Nationwide Permit. (Tr. p. 133, l. 6 – p. 134, l. 1; p. 143, ll. 1-10). Additionally, an individual 404 permit and accompanying 401 Water Quality Certification is not required unless a proposed activity does not meet the conditions of the Nationwide Permit and the 401 Water Quality Certification issued by the Department for the Nationwide Permit. (Tr. p. 121, l. 23 – p. 122, l. 10; p. 156, l. 25 – p. 157, l. 22; p. 164, ll. 2-12).

Permitting for the Excavation of the Pond

28. The post-construction design for stormwater management of the site included the use of the existing Pond as a means of satisfying the requirement for control of the post-construction stormwater runoff rate. In order to meet the requirements for control of the stormwater runoff rate, Roper Pond will excavate the Pond to a depth of approximately 3-1/2 feet greater than the current depth. (Tr. p. 240, ll. 4-11).
29. A Corps permit is required for excavation of "any navigable water of the United States" under Section 10 of the Rivers and Harbors Act. 33 U.S.C.A. § 403. The jurisdiction determination issued by the Corps on January 5, 2005, indicated that there are no "navigable waters of the United States" on the Property. (Roper Pond Ex. 6). Charles Hightower and George Whatley also testified that the Pond is not a navigable water of the United States under Section 10 of the Federal Rivers and Harbors Act. (Tr. p. 140, l. 13 – p. 141, l. 7; p. 332, ll. 5-9). Petitioners neither claimed nor presented any evidence that the Pond is a navigable water of the United States under Section 10 of the Rivers and Harbors Act.
30. Mr. Whatley testified that excavation of the Pond and depositing the dredged material in an area upland from the Pond does not require a Corps permit. (Tr. p. 318, l. 19 – p. 319, l. 16; p. 327, l. 13 – p. 329, l. 5). Mr. Whatley also contacted Colt Bowles of the Corps to confirm that a Corps permit was not required for these activities. (Roper Pond Exs. 7 and 8). Mr. Bowles confirmed that no Corps permit was required for excavation of the Pond as long as the dredged material was placed in a truck or deposited onto an uplands area because the Pond is not a navigable water under Section 10 of the Rivers and Harbors Act and the proposed activity will not involve the placement of fill material in waters of the United States under Section 404 of the Clean Water Act. (Roper Pond Exs. 7 and 9).
31. The Department's 401 Wetlands Section also administers the State Construction in Navigable Waters Permitting Program. (Tr. p. 104, ll. 4-6). Mr. Hightower testified that the Pond is not a navigable water under the South Carolina Construction in Navigable Waters Permit Program, S.C. CODE ANN. REGS. § 19-450. (Tr. p. 147, ll. 16-18). Mr. Hightower further testified that there is no state permit required for a dredging of the

Pond. (Tr. p. 139, ll. 2-5; p. 141, l. 8-12). Ms. Stewart also testified that the excavation of the Pond for control of the post-development stormwater runoff rate at the site does not require authorization under the General Permit. (Tr. p. 50, ll. 3-16).

32. The Petitioners offered the expert testimony of Seth Reice, Ph.D., Professor of Ecology and Biology at the University of North Carolina at Chapel Hill. On June 3, 2009, Dr. Reice conducted water chemistry testing of the Pond and collected samples to identify the aquatic life in the Pond. (Tr. p. 179, ll. 5-11). At the site, Dr. Reice measured dissolved oxygen, salinity, conductivity and pH of the Pond water. (Tr. p. 183, ll. 19-22). Dr. Reice collected six samples from the bottom of the Pond to identify aquatic life in the Pond. (Tr. p. 186, ll. 2-19). Dr. Reice's original report identified the following aquatic life collected from the Pond: Progomphus obscurus, ophigomphus sp., hydracarina, chironomidae, zygopteran, hyalella azteca, polycentropus, lexicentropus, Carolina Redhorse, and Golden Redhorse. (Roper Pond Ex. 12). The report also included Dr. Reice's opinions regarding the condition of the Pond and the effect of the excavation of the Pond. Under the heading of "Ecological Assessment of the Pond Fauna" in this original report, Dr. Reice opined that Pond "is a healthy pond." *Id.* Under the heading of "The Projected Consequences of the Proposed Dredging of this Pond," Dr. Reice further opined: "The proposed dredging of this pond will simply destroy the ecosystem that is now present." *Id.*
33. When Dr. Reice was deposed by Roper Pond, he provided a second report to Respondents. (Roper Pond Ex. 11; Tr. p. 197, ll. 4-7). This second report included an identification of aquatic life which was identical to the original report. (Roper Pond Ex. 11). However, the second report did not include the opinions provided under the headings, "Ecological Assessment of the Pond Fauna" and "The Projected Consequences of the Proposed Dredging of this Pond." *Id.* Dr. Reice testified that he deleted these opinions from his report: "I was trying to restrict myself to what I actually knew as opposed to my conjectures." (Tr. p. 200, ll. 3-19).
34. During his testimony at the hearing in this matter, Dr. Reice provided a third report on his findings. (Roper Pond Ex. 22). Dr. Reice testified that the report was revised in response

to questions raised at the deposition regarding his identification of certain aquatic life collected from the Pond. (Tr. p. 198, ll. 1-3). Specifically, Dr. Reice determined that he had misidentified three of the species collected from the Pond and made the following corrections: the Lexingtonia was revised to muscularim securis; the Carolina Redhorse was revised to Silver Redhorse; and the Golden Redhorse was revised to Creek Chubsucker. (Roper Pond ex. 22; Tr. p. 197, ll. 7-14). This third version also included the opinions listed under the headings, "Ecological Assessment of the Pond Fauna" and "The Projected Consequences of the Proposed Dredging of this Pond," which had been deleted from his second report. (Roper Pond Ex. 22). However, Dr. Reice testified that he had not intended to include those opinions in the third report. (Tr. p. 200, l. 3 – p. 201, l. 5).

35. In assessing the aquatic life of the Pond and the potential consequences of the dredging of the Pond, Dr. Reice did not review the General Permit, the SWPPP, or the BMPs to be implemented under the SWPPP. (Tr. p. 201, l. 12 – p. 202, l. 7). Dr. Reice was not provided information on the extent or the method of the proposed excavation of the Pond. (Tr. p. 203, ll. 18-23). Dr. Reice has no training or experience as an engineer or in preparing or reviewing stormwater pollution prevention plans. (Tr. p. 202, ll. 8-21). While Dr. Reice has studied the impacts of sedimentation on aquatic life in streams and ponds, Dr. Reice has not conducted studies related to the impact of excavation on aquatic life in streams and ponds. (Tr. p. 190, l. 18 – p. 191, l. 6). With respect to the land-disturbing activities authorized under the General Permit, Dr. Reice testified that he had no opinion regarding any potential impacts of such activities on the Pond. (Tr. p. 211, ll. 2-11).
36. The Department did not consider impacts of lowering the Pond in its review of Roper Pond's SWPPP. (Tr. p. 36, ll. 15-23). Section 1.3(C)(3) of the General Permit provides as follows: "This permit does not authorize discharges that DHEC, prior to authorization under this permit, determines will cause, have the reasonable potential to cause, or contribute to a violation of any applicable water quality standard." (Pet. Ex. 3, p. 3). The State water quality standards are found in S.C. CODE ANN. REG. § 61-68. Section 4.4 of the General Permit provides that the approved SWPPP "developed, implemented, and

updated consistent with Part 3.0 is considered as stringent as necessary to ensure that your discharges do not cause or contribute to a violation of any applicable water quality standard.” (Pet. Ex. 3, p. 26; Tr. p. 36, ll. 6-14). Ms. Stewart testified the the SWPPP with the revisions requested by the Department met all the requirements of the General Permit. (Tr. p. 71, ll. 13-17). Petitioners presented no evidence that the SWPPP failed to conform to any provisions of Part 3.0 of the Permit.

III. CONCLUSIONS OF LAW

Based upon the above findings of fact, I conclude the following as a matter of law:

A. Jurisdiction and Standard of Proof

The Administrative Law Court has jurisdiction over this contested case matter pursuant to S.C. CODE ANN. § 1-23-600(A) (Supp. 2008) and S.C. CODE ANN. §44-1-60(F)(2) (Supp. 2008). Petitioners, as the parties challenging the issuance of the permit for the Proposed Landfill, bear the burden of proof in this case. *See Leventis v. S.C. Dep't of Health & Envtl. Control*, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000) (holding that the burden of proof in administrative proceedings generally rests upon the party asserting the affirmative of an issue). The standard of proof in weighing the evidence and making a decision on the merits at a contested case hearing is a preponderance of the evidence. *Nat'l Health Corp. v. S.C. Department of Health and Envtl. Control*, 298 S.C. 373, 380 S.E.2d 841 (Ct. App. 1989). This Court reviews the evidence presented to determine “whether DHEC followed the regulatory procedures during the permit review process.” *Leventis*, 340 S.C. at 133, 530 S.E.2d at 651.

B. Standing

A fundamental prerequisite to institute an action is the requirement that the Petitioners have standing. *Blanding v. Coleman*, 285 S.C. 472, 330 S.E.2d 298 (1985). In *Sea Pines Association for Protection of Wildlife, Inc. v. South Carolina Department of Natural Resources*, the South Carolina Supreme Court adopted the following 3-prong test for establishing standing as set forth by the U.S. Supreme Court in *Lujan v. Defenders of Wildlife*:

First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not “conjectural” or “hypothetical.”

Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court."

Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)). The party seeking to establish standing carries the burden of demonstrating each of the three elements. *Id.* at 601, 550 S.E.2d at 291. For the reasons set forth below, Petitioners have failed to meet the burden to establish standing to challenge the Department's action in this matter.

1. The Town of Arcadia Lakes

The Town of Arcadia Lakes ("Town") cannot satisfy the first element of the standing test set forth in the *Sea Pines* case. As a general rule, to have standing, a litigant must have a personal stake in the subject matter of the litigation. *Glaze v. Grooms*, 324 S.C. 249, 478 S.E.2d 841 (1996). One must be a real party in interest. *Charleston County Sch. Dist. v. Charleston County Election Comm'n*, 336 S.C. 174, 181, 519 S.E.2d 567, 571 (1999). "The general rule is that a municipality must allege an infringement of its own proprietary interests or statutory rights to establish standing." *Glaze v. Grooms*, 324 S.C. 249, 255, 478 S.E.2d 841, 845 (S.C. 1996) (citing *City of Spartanburg v. County of Spartanburg*, 303 S.C. 393, 401 S.E.2d 158 (1991)). In this case, the Town has alleged no injury separate from that of its individual citizens. Cary Lake is privately owned by the Cary Lake Homeowners Association. (Town Dep., p. 43, l. 22 – p. 44, l. 9). The Town has no ownership interest in Cary Lake. (Town Dep, p. 44, ll. 1-4). The Town is in no way responsible for the maintenance or remediation of Cary Lake. (Town Dep., p. 46, l. 24 – p. 49, l. 15). The Town does not now and has never budgeted funds for the remediation of Cary Lake. (Town Dep., p. 46, l. 24 – p. 49, l. 15). Accordingly, the Town has no proprietary interest or statutory rights which would potentially be impacted by the Proposed Project.

In *Capital View Fire District v. County of Richland*, the South Carolina Court of Appeals held that Capital View Fire District, a special purpose district, did not have standing to challenge the validity of an agreement between the city and the county for the extension of city fire-fighting services. 297 S.C. 359, 363, 377 S.E.2d 122, 124 (Ct. App. 1989). Capital View Fire

District argued that it was entitled to bring a suit on behalf of its citizens who might be harmed by the agreement at issue under the doctrine of *parens patriae*, even if it failed to suffer an injury itself. The Court held that the Capital View Fire District, a political subdivision of the State, cannot bring an action on to protect the interests of its citizens:

The doctrine of *parens patriae* applies only to sovereigns asserting at least quasi-sovereign interests apart from the interests of particular private citizens. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 102 S.Ct. 3260, 73 L.Ed.2d 995 (1982). Political subdivisions, such as cities and counties, however, lack the element of sovereignty that is a prerequisite to maintaining a suit under the doctrine of *parens patriae*. See *Board of County Commissioners v. Denver Board of Water Commissioners*, 718 P.2d 235 (Colo. 1986) (counties lack the element of sovereignty that is a prerequisite for *parens patriae* standing); *United States v. City of Pittsburg, California*, 661 F.2d 783 (9th Cir.1981) (only the states and the federal government may sue as *parens patriae*); cf. *Board of Supervisors of Fairfax County, Virginia v. United States*, 408 F.Supp. 556, 566 (E.D.Va.1976) (“Fairfax County, however, is not a sovereign, but rather a political subdivision whose powers are derivative of the sovereign State of Virginia.”).

Id. at 362-363, 377 S.E.2d at 124. Likewise, the Town has failed to establish an injury to the Town which would establish standing to challenge the Department’s decision in this matter. Accordingly, the Town lacks standing in this matter.

2. The Kaminer Station Petitioners

The Kaminer Station petitioners also failed to present evidence to establish the first and second elements of the *Sea Pines* test for standing. The Kaminer Station Subdivision is adjacent to the Roper Pond Property and upgradient of the Roper Pond Property. (Tr. p. 241, l. 22 – p. 242, l. 10; p. 256, l. 11 – p. 257, l. 2). Linda Jackson, a resident of the Kaminer Station Subdivision, testified that she enjoys the view of the Pond on the Roper Pond Property and Cary Lake during walks in the area. (Tr. p. 243, l. 1 – p. 246, l. 15). Ms. Jackson further testified Cary Lake is privately owned, and there is no public access to Cary Lake. (Tr. p. 254, ll. 8-23). “A private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in danger of sustaining, prejudice therefrom. ‘[I]t is not sufficient that he has merely a general interest common to all members of the public.’” *Florence Morning News, Inc., v. Building Comm’n*, 265 S.C. 389, 218 S.E.2d 881 (1975) (quoting *Ex parte Levitt*, 302 U.S. 633 (1937)). Ms. Jackson, on behalf of the Kaminer Station

petitioners, has failed to identify any harm to these petitioners. Since Kaminer Station is upgradient from the Proposed Development, there can be no allegation that the Proposed Development will directly impact the Kaminer Station petitioners. With respect to the enjoyment of viewing the Pond and Cary Lake, the Kaminer Station petitioners do not have a property interest in either the Pond or Cary Lake. There is no public access to Cary Lake. Accordingly, the Kaminer Station petitioners' interest in the view of the Pond and of Cary Lake is nothing more than a general interest common to all members of the public.

Additionally, to the extent that the Kaminer Station petitioners could allege some potential harm from the Proposed Project, Ms. Jackson testified that any negative impacts to Cary Lake would be the result of Roper Pond's failure to follow the General Permit and the SWPPP during the construction of the Proposed Project. (Tr. p. 250, l. 16 – p. 251, l. 7). The matter before this Court involves the Department's decision to grant coverage for the Proposed Project under the General Permit, not the enforcement of the conditions of the General Permit during the construction of the Property. As such, the Kaminer Station petitioners have failed to demonstrate a causal connection between the alleged injury and the conduct challenged. The Kaminer Station petitioners thus have no standing to bring this action.

3. The Cary Lake Petitioners

The Cary Lake petitioners have failed to demonstrate that the issuance of coverage under the General Permit will cause an actual or imminent injury. The first element of the *Sea Pines* test requires the Cary Lake residents to present evidence of the following:

the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not "conjectural" or "hypothetical."

Sea Pines, 345 S.C. at 601, 550 S.E.2d at 291. Cary Lake is on the opposite side of Trenholm Road from the Roper Pond Property. (Tr. p. 263, ll. 18-23). Elaine Starr, a resident of the Cary Lake subdivision, testified that she and her family use the lake for swimming, boating, and fishing. (Tr. p. 264, ll. 6-13). Ms. Starr testified that the condition of Cary Lake has deteriorated over the years. (Tr. p. 264, ll. 6-23). Ms. Starr testified that Cary Lake has been impacted by sediment from previous development in the area. (Tr. p. 277, l. 15 – p. 280, l. 20). Ms. Starr

testified that any development in the area would exacerbate the condition of Cary Lake. (Tr. p. 277, ll 7-23). Ms. Starr further testified that the stormwater from the Proposed Project will negatively impact Cary Lake even if the SWPPP approved by the Department is implemented as designed. *Id.* Ms. Starr testified that she believed that any increase in density of the Property would have a detrimental impact because the impervious surfaces, such as the roof tops, garages, pavement, and sidewalks, would increase the rate of stormwater runoff. (Tr. p. 277, l. 24 - p. 281, l. 14).

As with the Kaminer Station petitioners, the contention assumes a violation of the General Permit and the Stormwater Regulations. The Stormwater Regulations require an applicant to demonstrate that the development of the site does not create a post-construction stormwater runoff rate that is greater than the pre-construction stormwater runoff rate. 26 S.C. CODE ANN. REGS. § 72-307(C)(4)(a). Accordingly, the SWPPP must include measure to maintain the post-development stormwater runoff at a level equal to or less than the pre-development runoff rate. Ms. Starr's concerns regarding an increase in the runoff rate would thus be the result of a violation of the General Permit, not the Department's issuance of coverage under the General Permit.

The Cary Lake petitioners have simply failed to present any evidence of an injury in fact as a result of the issuance of coverage under the General Permit. Ms. Starr testified that she had not reviewed the stormwater plan for the Proposed Project. (Tr. p. 276, ll. 14-18). Petitioners' expert opined on the potential consequences of the proposed dredging on the Pond; however, he offered no opinion on the impact of the land-disturbing activities authorized under the General Permit on the Pond or Cary Lake. (Tr. p. 203, ll. 18-23; p. 211, ll. 2-11). Petitioners offer no evidence that the sedimentation from the Roper Pond Property would impact Cary Lake. While Ms. Jackson and Ms. Starr testified that the Proposed Project might impact Cary Lake, such testimony was based on the assumption that Roper Pond would neither follow the SWPPP nor employ the BMPs as required by the General Permit and the Stormwater Regulations. The Cary Lake petitioners simply failed to meet the burden of demonstrating an injury in fact in connection with the Department's grant of coverage under the General Permit to Roper Pond. To the extent that Cary Lake petitioners contend that the Proposed Project will adversely impact Cary Lake, such contention is entirely speculative.

Additionally, the South Carolina Supreme Court holding in *Smiley v. South Carolina Department of Health and Environmental Control* can be easily distinguished from the instant case. 374 S.C. 326, 649 S.E.2d 31 (2007). In *Smiley*, the petitioner challenged the issuance of a permit to remove sand from a public beach under the Coastal Zone Management Act. The petitioner alleged the following injury in fact: "I am partially disabled with paralysis of muscles in both legs as a result of a spinal cord injury in 1979. After my release from the hospital in late 1979, I began a course of rehabilitation which continues today and involves jogging on the flat hard public beach on the Isle of Palms. I use the beach in area[s] where sand will be excavated and which is the subject of this proceeding on an almost daily basis." 374 S.C. 326, 330, 649 S.E.2d 31, 33 (2007). The Court held that even though the injury to the petitioner would only be temporary, the injury was sufficient to give him a stake in the outcome of the matter. 374 S.C. at 332-333, 649 S.E.2d at 34. In contrast to the instant case, the petitioner in *Smiley* was directly impacted by the issuance of the permit because he could not run on the beach during the conduct of the work authorized under the permit. Petitioners in this matter have simply failed to present any evidence of a direct harm caused by the issuance of the coverage under the General Permit. Petitioners have presented no evidence that the BMPs and procedures authorized under the General Permit and the SWPPP are inadequate to control sediment from leaving the construction site. Instead, Petitioners merely speculate that Roper Pond will fail to follow the General Permit and the SWPPP. Such contentions do not support a showing of standing to challenge the issuance of the coverage under the General Permit. The potential harm alleged would not be caused by the issuance of coverage under the General Permit. Such harm would be the result of a violation of the General Permit. As such, the Cary Lake residents lack standing to challenge the issuance of coverage under the General Permit to Roper Pond.

However, even if Petitioners could establish standing to challenge the Department's grant of coverage under the General Permit, their claims fail for the following reasons:

C. Roper Pond has an effective 404 Permit and 401 Water Quality Certification for the impacts to wetlands on the Property.

Petitioners offered no evidence that the SWPPP does not require adequate BMPs to control erosion and sediment on the construction site for the Proposed Project. Indeed, the Department reviewed Roper Pond's SWPPP and requested certain revisions to the plan. (Tr. p. 57, ll. 3-8). Jill Stewart testified that the Roper Pond SWPPP with the requested revisions

satisfied the requirements of the General Permit and the Stormwater Regulations. (*Id.*; Tr. p. 58, ll. 16-19; p. 71, ll. 13-17). Ms. Stewart further testified that any impacts from the Proposed Project on Roper Pond or Cary Lake would be the result of a violation of the SWPPP and the conditions of the General Permit, not the authorization for coverage under the General Permit. (Tr. p. 75, ll. 19-25). Petitioners' only expert did not review the General Permit, the SWPPP, or the BMPs to be implemented under the SWPPP and offered no opinion regarding the sufficiency of such measures. (Tr. p. 201, l. 12 – p. 202, l. 7; p. 211, ll. 2-11). In fact, none of Petitioners witnesses reviewed the General Permit, the SWPPP, or the BMPs to be implemented under the SWPPP. (Tr. p. 201, l. 12 – p. 202, l. 7; Tr. p. 276, ll. 14-18). As such, the evidence on the record demonstrates that the SWPPP conforms to the technical requirements of the General Permit and the Stormwater Regulations. Indeed, in its Request for Contested Case Hearing, Petitioners alleged “significant defects in the construction and post-construction portions” of the SWPPP. However, Petitioners failed to offer evidence to prove such allegations at the hearing in this matter. Not only did Petitioners fail to offer expert testimony regarding the alleged defects in SWPPP, Petitioners offered no evidence at all in support of this fundamental claim.

While Petitioners make no claims with respect to the technical sufficiency of the SWPPP, they contend that the Department erred in granting coverage for the Proposed Project under the General Permit because Roper Pond does not has an effective 404 permit for the Project. The evidence on the record does not support this claim. The design for the Proposed Project includes the filling of 0.075 acres of jurisdictional wetlands. In 2007 the Corps issued Nationwide Permit 29 which authorizes the fill of up to 0.10 acres of jurisdictional wetlands. (Tr. p. 140, ll. 4-12). Nationwide Permit 29 requires a developer who intends to conduct activities under the Permit to provide a PCN to the Corps prior to conducting such activities. Accordingly, pursuant to Section 33 C.F.R. § 330.1 of the Corps regulations, the wetlands scientist for Roper Pond submitted a PCN for the filling of 0.075 acres of wetlands on April 30, 2008. (Roper Pond Ex 6). By letter dated February 25, 2009, the Corps verified that the proposed activities were authorized under Nationwide Permit 29. (Roper Pond Ex. 1). Corps further advised that the Proposed Project must comply with the following conditions:

1. That prior to beginning the authorized work the permittee must obtain and provide the Corps with a copy of all appropriate state certifications and/or authorizations (i.e. 401 Water Quality Certification, Coastal Zone Management Consistency Determination, State Navigable Waters

Permit). If the permittee fails to obtain the necessary state certifications and/or authorizations prior to beginning work, this will be considered a willful knowing violation of the Clean Water Act and appropriate enforcement action will be taken.

(Pet. Ex. 1). Mr. Whatley testified that the references to other state certifications and authorization are merely provided as examples of other authorizations that may be required for a project. (Tr. p. 339, ll. 7-23). The 401 Water Quality Certification for Nationwide Permit 29 had already been issued by the Department in 2007. (Tr. p. 117 – p. 118, l. 11). A Coastal Zone Management Consistency Determination was not required for the Proposed Project because the Property is not located in any of the eight coastal counties covered by the Coastal Zone Management Act, S.C. CODE ANN. §§ 48-39-10 *et seq.* S.C. CODE ANN. § 48-39-10(B). Finally, the activities do not impact a navigable water under the State Navigable Waters Act. (Tr. p. 147, ll. 16-18). Petitioners offered no evidence to the contrary. Accordingly, Roper Pond has all state certifications and authorization necessary for the proposed activities under Nationwide Permit 29.

Petitioners further contend that the Department has not issued a 401 Water Quality Certification for the Proposed Project. This contention is without merit. In 2007 the Department conducted a 401 Water Quality Certification for the Nationwide Permit 29 in accordance with S.C. CODE ANN. REGS. § 61-101 and issued a Certification for the Permit with certain general conditions. (Tr. p. 117, l. 20 – p. 119, l. 5; p. 142, ll. 5-17). Pre-construction notification to the Department is not required under the 401 Water Quality Certification for Nationwide Permit 29 as long as the permittee meets the conditions of the 401 Water Quality Certification for the Nationwide Permit. (Tr. p. 115, ll. 4-25; p. 133, l. 12 – p. 134, l. 1; p. 135, ll. 15-18; p. 143, ll. 1-10). Accordingly, Roper Pond has an effective 404 permit and 401 Water Quality Certification for the filling of 0.075 acres of jurisdiction wetland in association with the Proposed Project.

D. The excavation of the Pond does not require a federal permit from the Corps.

Petitioners argue that the Department erred in approving coverage under the General Permit because the SWPPP incorporated the Pond in the post-construction storm water management system for the Site and Roper Pond failed to obtain a Corps permit for the dredging of the Pond. Specifically, Petitioners contend that the Department's approval of coverage under

the General Permit is contrary to Section 72-307(C)(7) of the Regulations, which provides as follows:

Where existing wetlands are intended as a component of an overall stormwater management system, the approved stormwater management and sediment control plan shall not be implemented until all necessary federal and state permits have been obtained.

26 S.C. CODE ANN. REGS. § 72-307(C)(7). Additionally, Section 2.1(C) of the General Permit provides as follows: “If a US Army Corps of Engineers’ 404 Permit is required by Section 404 of the CWA for permanent or temporary storm water control structures, DHEC may not grant coverage under this GCP until the 404 Permit has been issued and is effective.” (Pet. Ex. 3, p. 4). Roper Pond proposes to excavate the Pond and deposit the dredged material in an area upland from the Pond. (Tr. p. 318, l. 19 – p. 319, l. 16; p. 327, l. 13 – p. 329, l. 5).

The federal government administers the permitting program for dredging and filling of wetlands pursuant to Section 404 of the Clean Water Act and Section 10 of the Federal Rivers and Harbors Act. 33 U.S.C.A. § 1344; 33 U.S.C.A. §§ 401. Section 404 of the Clean Water Act requires a permit issued by the Corps “for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” 33 U.S.C.A. § 1344(a). The discharge of dredged and fill material is defined in 33 CFR 323.2, which provides in relevant part as follows:

(i) The term “dredged material” means *material that is excavated or dredged from waters of the United States.*

(j) The term “discharge of dredged material” means *any addition of dredged material into the waters of the United States.* The term includes, without limitation, the addition of dredged material to a specified discharge site located in waters of the United States and the runoff or overflow from a contained land or water disposal area. Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill) are not included within this term and are subject to Section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps of Engineers. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products.

(k) The term “fill material” means *any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody.* The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402 of the Clean Water Act.

(l) The term “discharge of fill material” means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary to the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs. The terms does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products.

33 CFR 323.2 (i)-(l). It is clear that a 404 permit for “the discharge of dredged or fill material” is required only in those circumstances in which such material is being added to waters of the United States. Accordingly, contrary to Petitioners’ contention, a 404 permit under the Clean Water Act is not required for the excavation or dredging of a water of the United States.

A Corps permit is required for excavation of “any navigable water of the United States” under Section 10 of the Rivers and Harbors Act. 33 U.S.C.A. § 403. Section 10 of the Act provides in relevant part:

[I]t shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War [Army] prior to beginning the same

Id. The definition of “any navigable water of the United States” in the Rivers and Harbors Act is much narrower than the terms “navigable waters” and “waters of the United States” as used in the Clean Water Act.

Under the Clean Water Act, “navigable waters” means the waters of the United States, including the territorial seas.” 33 U.S.C.A. § 1362(7). The Corps’ regulations implementing the Clean Water Act define “waters of the United States” to include the following:

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;

- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce . . .;
- (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
- (5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
- (6) The territorial seas;
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

33 C.F.R. § 328.3(a). In contrast, the navigable waters of the United States subject to the Rivers and Harbors Act as defined in 33 C.F.R. Part 329 is limited to “those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible to use **to transport interstate or foreign commerce.**” 33 C.F.R. § 329.4 (emphasis added).

Federal case law has recognized the distinction between “waters of the United States” under the Clean Water Act and “navigable waters of the United States” under the Rivers and Harbors Act. “The term ‘navigable waters of the United States’ as used in the Rivers and Harbors Act of 1899 has a substantially different, and more limited, meaning than the term as used in the Clean Water Act.” *1902 Atlantic Ltd. v. Hudson*, 574 F.Supp. 1381, 1392 (D.C. Va. 1983). “In contrast to the Clean Water Act, Congress did not intend the term ‘navigable waters of the United States’ to reach to the full extent of congressional power over commerce as granted by Article 1, Section 8 of the Constitution. Rather, the term is restricted to the traditional definition of navigable waters as of 1899, the time of enactment of the Rivers and Harbors Act.” *Id.* (citations omitted). Accordingly, in the instant case, the excavation of the Pond would require a permit under Section 10 of Rivers and Harbors Act only if the Pond were in fact navigable. Petitioners presented no such evidence.

The jurisdiction determination issued by the Corps on January 5, 2005, indicated that there are no “navigable waters of the United States” on the Property. (Roper Pond Ex. 6). Charles Hightower and George Whatley also testified that the Pond is not a navigable water of the United States under Section 10 of the Federal Rivers and Harbors Act. (Tr. p. 140, l. 13 – p.

141, l. 7; p. 332, ll. 5-9). Petitioners neither claimed nor presented any evidence that the Pond is a navigable water of the United States under Section 10 of the Rivers and Harbors Act. The evidence on the record clearly demonstrates that the Pond is not a “navigable water of the United States” and is thus not subject to permitting under the Rivers and Harbors Act.

E. Excavation of the Pond does not require a 401 Water Quality Certification.

Petitioners argue that a 401 Water Quality Certification is required for all water quality impacts for the Proposed Project, including the excavation of the Pond. There is no statutory or regulatory basis for this claim. Neither the General Permit nor the Stormwater Regulations imposes any requirement for a 401 Water Quality Certification in connection with the approval of coverage under the General Permit. The Department administers the water quality certification program pursuant to Section 401 of the Clean Water Act and has promulgated regulations governing certification at S.C. CODE ANN. REGS. § 61-101. 25A S.C. CODE ANN. REGS. 61-101(A)(1). Section 401(a)(1) of the Clean Water Act authorizes state action in connection with issuance of federal licenses and permits for discharges to navigable waters, 33 U.S.C.A. § 1341. State action on a 401 Water Quality Certification is only triggered for discharges to be authorized under a federal permit under Section 404 of the Clean Water Act or Sections 9 or 10 of the Rivers and Harbors Act. *Id.* Since the dredging of the Pond does not require a permit under the Clean Water Act or the Rivers and Harbors Act, the Department is neither required to nor has authority to conduct a 401 Water Quality Certification in connection with such activities.

F. The Department’s authorization of coverage under the General Permit does not require assessment of water quality impacts under the State Water Quality Standards.

Petitioners contend that the Department erred in granting coverage under the General Permit because the Proposed Project violates the State water quality standards of S.C. CODE ANN. REG. § 61-68 (“Regulation 61-68”). The Department’s authorization for coverage under the General Permit is governed by the S.C. CODE ANN. REG. § 72-300 *et seq.* Specifically, Section 72-307 establishes the design criteria and minimum standards for SWPPPs for land-disturbing activities for projects disturbing more than five acres. 26 S.C. CODE ANN. REG. § 72-

305(B)(3). Section 72-307(B)(5) establishes the criteria for water quality protection for such projects. 26 S.C. CODE ANN. REG. § 72-307(B)(5). Section 72-307 makes no reference to the State water quality standards established in Regulation 61-68. “Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect.” *Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (citations omitted). As such, Regulation 61-68 has no application in the Department’s review of Roper Pond’s request for coverage under the General Permit.

In *Responsible Economic Development v. South Carolina Dept. of Health and Environmental Control*, the South Carolina Supreme Court addressed the application of the anti-degradation provisions of Regulation 61-68 to a stormwater permit for the construction of a retail store on a 43-acre parcel of land. 371 S.C. 547, 641 S.E.2d 425 (2007). The parties challenging the issuance of the permit argued that the permit violated Regulations 61-68 and 61-69 which were promulgated pursuant to the Pollution Control Act, S.C. CODE ANN. §§ 48-1-20 *et seq.* In rejecting this argument, the Court noted that “the legislature enacted the Stormwater Management and Sediment Reduction Act to specifically deal with stormwater management and sediment reduction.” S.C. CODE ANN. § 48-14-30(A). The Court held that the Department’s review of an application for a stormwater permit must be conducted pursuant to the Stormwater Act and the regulations promulgated thereunder:

The Stormwater Management and Sediment Reduction Act (Stormwater Act) requires a person who intends to engage in a land disturbing activity to submit a stormwater management and sediment control plan to the appropriate agency and obtain a permit before engaging in the activity, unless an exemption applies. S.C. CODE ANN. § 48-14-30 (Supp.2005). The Stormwater Act further requires DHEC to promulgate regulations for the “types of activities that require a stormwater . . . permit” and for “permit application and approval requirements.” *Id.* § 48-14-50(C)(3) & (9). DHEC fulfilled that duty by promulgating, in relevant part, Regulations 72-305 and -307. Regulation 72-305 outlines the permit application and approval procedure, and Regulation 72-307 sets forth the minimum standards and specifications and the specific design criteria for projects requiring a stormwater management and sediment control plan.

Id. at 547, 551, 641 S.E.2d at 427. The Court further expressly held that regulations promulgated under the Pollution Control Act are not applicable in the review of an application for the stormwater permit:

Relevant to this appeal, the regulations of the Pollution Control Act Regulations 61-68 and -69 and the regulations of the Stormwater Act Regulations 72-305 and -307 do not reference each other and are authorized by different enabling acts. In the absence of statutory authorization to apply the two acts and their corresponding regulations to each other, the regulations of the Pollution Control Act do not apply to the Stormwater Act or its regulations. **Accordingly, we conclude, as a matter of law, the case-by-case modification of regulatory requirements under the Stormwater Act cannot be invoked because of an alleged violation of the Pollution Control Act's regulations. Furthermore, a stormwater permit issued pursuant to the Stormwater Act cannot be denied based on the regulations of the Pollution Control Act.** Therefore, Regulation 72-305(B)(4) does not require the denial of a stormwater permit on the ground that the anti-degradation rules have been violated because the regulations of the Pollution Control Act do not apply to the Stormwater Act.

Id. at 552-553, 641 S.E.2d at 428 (emphasis added). Accordingly, Petitioners' contention that the Department erred in failing to consider potential impacts on Regulation 61-68 water quality standards in its review of Roper Pond's application is without merit.

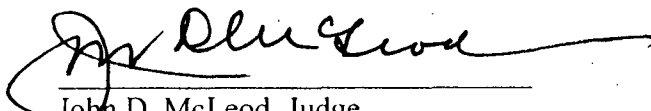
IV. ORDER

Based upon the above Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that the South Carolina Department of Health and Environmental Control's grant of coverage to Roper Pond under the General Permit is upheld.

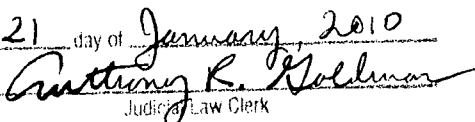
AND IT IS SO ORDERED.

January 21, 2010
Columbia, S.C.


John D. McLeod, Judge
S.C. Administrative Law Court

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 21 day of January, 2010
By: 
Judicial Law Clerk

BOARD:

Paul C. Aughry, III
Chairman

Edwin H. Cooper, III
Vice Chairman

Steven G. Kisner
Secretary



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

BOARD:

Henry C. Scott

M. David Mitchell, MD

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S.C. Board of Health and Environmental Control; Telephone (803) 898-3309 Fax: (803) 898-3393

January 14, 2009

U.S. Mail - CERTIFIED -- Return Receipt

91 7108 2133 3935 6630 6871

Richard W. Thomas, Jr.
Mayor of Arcadia Lakes
6626A Arcadia Woods Road
Columbia, SC 29206

Via Interagency Mail Delivery

Stephen P. Hightower, Esquire
SCDHEC - Office of General Counsel
2600 Bull Street
Columbia, SC 29201

RE: **Docket No. 08-RFR-148** - Request review of staff decision dated December 15, 2008, to grant approval of the Stormwater Pollution Prevention Plan for Roper Pond Apartments under NPDES General Permit for Storm Water Discharge from Large and Small Construction Activities. Project coverage number is SCR10J889.

The S.C. Board of Health and Environmental Control decided on January 8, 2009, not to conduct a Final Review Conference on the above-referenced matter.

S.C. Code Section 44-1-60(F), 2006 Act No. 387, Section 48, provides, "If a final review conference is not conducted within sixty days, the department decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court, in accordance with the Administrative Procedures Act, within thirty days after the deadline for the final review conference."

A request for a contested case hearing before the Administrative Law Court (ALC) must be filed in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

Clerk's Office
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton St., Suite 224
Columbia, SC 29201

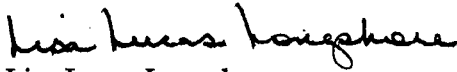
0197

rev. Permitte inadvertently left off mailing - Sent via e-mail 2/13/09

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: <http://www.scalc.net>. Further information on filing a request for a contested case hearing before the ALC may be obtained by calling the Clerk's Office at the Administrative Law Court (803-734-0550).

If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the address at the top of this memorandum.

Sincerely,



Lisa Lucas Longshore
Clerk

The above information on filing a request for a contested case hearing before the Administrative Law Court is provided as a courtesy; parties before the ALC are responsible for complying with all applicable requirements of the Court.

OCG # 20827

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December 30, 2008

RECEIVED
S.C. DEPT OF HEALTH
& ENVIRONMENTAL CONTROL

2008 DEC 30 PM 4: 54

OFFICE OF THE COMMISSIONER
CHIEF OF STAFF
CLERK OF SCDHEC BOARD

HAND-DELIVERED

Clerk of the Board
SC DHEC
2600 Bull Street
Columbia, South Carolina 29201

Re: ROPER POND APARTMENTS, Richland County
File Number: 40-08-09-08
Site Location: 6837 North Trenholm Road
TMS# R16907-01-04

Dear Board Members of SC DHEC:

With regard to the referenced project, we, the undersigned affected persons and/or entities, respectfully request that the Board review the DHEC staff decision to allow a land disturbance permit to be issued for the project and to overturn the decision. The project will adversely impact the surrounding community and the environment and, in particular, Cary Lake which is in the already impaired Gills Creek Watershed. As you know, the watershed runs from Sesquicentennial State Park to the Congaree River through eight member districts of Richland County Council and is a wonderful resource that we all enjoy.

The following technical issues need to be addressed as part of our request for overturning the decision to issue the permit:

- (1) The developer sought coverage under the wrong Nationwide permit regarding wetlands;
- (2) The developer did not disclose lowering the water elevation of Roper Pond as part of the wetlands impact permit application. Lowering the pond would cause an impact to the wetlands which is part of the property;
- (3) The design engineer for the project ignored the first flush volume requirements which would affect the water quality in a developed condition;
- (4) The proposed particle size distribution is incorrect in the calculations used by the design engineer for post-development stormwater runoff.

The Notice of Intent for this project was signed by Mr. Bob Mundy. The current owner of record of the land upon which the project is to be built is Roper Pond, LLC of which Mr. Mundy was a member. According to Mr. Mundy, Roper Pond, LLC was sold to Capital

Development, LLC in January of 2008. Does Mr. Mundy have the required approval to request and sign documents with this project and any permit requests?

Please contact the Mayor of Arcadia Lakes, Richard W. Thomas, Jr., in response to this appeal. The Town's address is 6626A Arcadia Woods Rd., Columbia, SC 29206. The telephone number for the Town is 782-2272. Please contact the other individuals signing on this appeal at their respective addresses.

We appreciate your time and consideration of our appeal.

Respectfully submitted by the
undersigned,

See attached sheets for Signatures and
Addresses

SIGNATURE

ADDRESS

Charles D. Shry

6626 4 Arcadia Woods Rd

Major, Town of Arcadia, Ala, SC. 29206

Charles D. Shry

27 Huntwick Ct.

Individually

Blumbert, SC 29206

Robert E. Jackson

6720 Kaminer Dr. Columbia, SC, 29206

Robert E. Jackson

6720 Kaminer Dr. Columbia, SC 29206

SIGNATURE

ADDRESS

Christine W. Murphy6626A Alondra Woods Rd.
Columbia, SC 29206Robert William Do6737 Kammern Drive
Columbia, SC 29206Elizabeth M. Walker40 Seawood Ct. 29206Mary Helen Spradlin6709 Kammern Dr. 29206T W Wzy35 Huntwick CT. Coler
29206Mandy D'Albeto15 Huntwick Ct. Coler, SC
29206Long Lin Lan19 Huntwick Ct Coler, SC 29206Louis E Spradlin6769 Kammern Dr Coler SC 29206

SIGNATURE

ADDRESS

Barbara S. Williams6737 Kaminer Drive
Cot. SC 29206Robert E. Williams, Jr ^{on other sheet}6737 Kaminer Drive
Cot. SC 29206Arum & Bette Small33 Seawood Ct Cot-29206Mary & Tommy Dail6721 Kaminer Dr.
Cot. SC 29206E. R. Jones + Tracy Jones6708 Kaminer Dr., SC 29206Julie & Ullah Wayne (Mayson)6704 Kaminer Dr 29206

SIGNATURE

ADDRESS

Dene J. Star, M.D. 6819 Sandy Shores Rd. 29206

Glenn J. Star 6819 Sandy Shore 29206-2244

Ruth L. Marcus 6921 Sandy Shore 29206

Stanford J. Marcus 6921 Sandy Shore Rd. 29206

Lance C. Gibbs 6717 Sandy Shore Rd 29206

Wm L. Evers 6720 Sandy Shore Road 29206

Her Brown 6748 Cary Lane 29206



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

December 15, 2008

BOB MUNDY
ROPER POND LLC
1401 MAIN ST STE 650
COLUMBIA SC 29201

RE: ROPER POND APARTMENTS, Richland County
File number: 40-08-09-08

Dear Bob Mundy:

The Department of Health and Environmental Control (Department or DHEC) has approved the Stormwater Pollution Prevention Plan (SWPPP) for the referenced project on **December 15, 2008**. Based on your submission of the Notice of Intent (NOI) and in accordance with the NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities SCR100000 (2006 CGP), this project has been granted coverage under the 2006 CGP. This project's general permit coverage number is **SCR10J889**. The total disturbed area for this site is **9.6 acres**. This NPDES coverage expires on **12/15/2013**, 5 years from the date of issuance.

The inspections for this site must be performed by qualified personnel who meets the requirements list in Section 3.10.D of the 2006 CGP. Qualified personnel must be one of the following:

1. SWPPP preparer
2. Person under direct supervision of SWPPP preparer
3. Person who has been certified through a Construction Site Inspector Certification Course that has been approved by DHEC (see our website for a list of approved courses)
4. Person with registration equivalent of SWPPP preparer
5. Person under direct supervision of person with registration equivalent to SWPPP preparer

An as-built survey, signed and sealed by a S.C. Licensed Land Surveyor, should be submitted for the 1 structure(s) on this site. The survey(s) should show grades, contours, and depths for all structures and should include the elevations and dimensions of all outlet structures, including but not limited to pipes, orifices, risers, weirs, and emergency spillways. A statement signed by the project's S.C. Registered Engineer indicating that the structure(s) was installed and is operating as shown on approved plans and in approved calculations is required. If the elevations or dimensions of the structures listed above do not match those used in the approved plans, provide a certification statement signed by the project's S.C. Registered Engineer indicating that the structure, as built, will function as shown in approved calculations. A new analysis of the structure (routing) may be necessary. The as-built survey and/ or analysis must be accepted by the Department before a Notice of Termination (NOT) can be submitted.

"Because this project impacts waters of the U.S./ State, make sure you obtain all necessary permits and certifications from USACOE and SC DHEC 401 Water Quality Certification, Standards, i Section before land-disturbing activities begin in those areas."

The 2006 CGP can be downloaded at the following website:

<http://www.scdhec.gov/environment/water/docs/finalcgp.pdf> or you may request a copy from us via email (stormwatercgp@dhec.sc.gov). You are responsible for ensuring your contractor(s) complies with the approved SWPPP and the minimum requirements of the 2006 CGP. Also, you are responsible for overall compliance with the Storm Water Management and Sediment Reduction Act of 1991 (1991 Act) and the Federal Clean Water Act (CWA).

You must notify this DHEC EQC Regional Office prior to starting any land-disturbing activity. The address and telephone number of the EQC office are as follows:

Columbia EQC Office
BUILDING 5 PO BOX 156
STATE PARK SC 29147-0156
803-896-0620

You should be aware that this approval is only applicable for the SWPPP that was submitted for this project. Any additional construction or land disturbing activity beyond the scope of the approved plans is not authorized. Any future work for this project not shown on the stamped, approved plans will require that you submit another site plan for review and approval. All major modifications require review and approval by the Department. Minor modifications to the approved SWPPP may be made by the SWPPP preparer and do not require review and approval by the Department; these changes should be signed and dated by the SWPPP preparer. If you have a question about whether a modification is major or minor, contact the Stormwater Permitting Section at (803) 898-4300.

Three (3) sets of stamped, approved plans are being provided to your engineer. A copy of the stamped, approved SWPPP (including a copy the 2006 CGP and signed co-permittee and contractor certifications), NOI, and CGP coverage letter from DHEC must be retained at the construction site (or accessible within 30 minutes during normal business hours) from the date of commencement of construction activities to the date of final stabilization. A copy of the stamped, approved SWPPP must be available at a central location on-site for the use of all those identified as having responsibilities under the SWPPP whenever they are on the construction site. If an on-site location is unavailable to store the SWPPP when no personnel are present, notice of the plan's location must be posted near the main entrance at the construction site.

All contractors who will conduct land-disturbing activities at the site must sign a certification statement as a co-permittee or as a contractor who is not a co-permittee. You are responsible for any contractor who is not a permittee. You are also responsible for listing all contractors in the SWPPP and for holding a pre-construction conference with each co-permittee and contractor who is not a co-permittee before they can conduct land-disturbing activity at the site.

The Department may conduct periodic inspections of your site. Any violations found during these inspections may result in enforcement action. Failure to comply with the approved SWPPP or the minimum requirements of the 2006 CGP, 1991 Act, or CWA may subject you to applicable penalties.

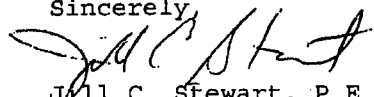
This NPDES coverage should be terminated by the permittee when one of the conditions listed in Section 5.1 of the 2006 CGP has been met. You must submit a Notice of Termination (NOT) to cancel your NPDES coverage under the 2006 CGP. Please see section 5.1 of the 2006 CGP for more information about termination of coverage.

You are responsible for obtaining any other federal, state, or local permit that may be required for this project. Please note we have not sent a copy of this letter to any county or city building official. You must send a copy of this letter to these agencies, if necessary.

Please see the enclosed "Notice of Appeal Procedure" document for information about the procedures for appealing this NPDES coverage. Also, see the enclosed document from the S.C. DHEC Compliance Assurance Division detailing some of the compliance requirements of the 2006 CGP.

If you have any questions or cannot access the referenced websites, please call me at 803-898-0439.

Sincerely,



Jill C. Stewart, P.E.
Stormwater Permitting Section

CC: James M Futter-BP BARBER & ASSOCIATES INC
Region 3, Columbia EQC Office



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

Notice of Appeal Procedure

The following procedures are in effect beginning July 1, 2006, pursuant to 2006 Act No. 387:

1. This decision of the S.C. Department of Health and Environmental Control (Department) becomes the final agency decision 15 days after notice of the decision has been mailed to the applicant or respondent, unless a written request for final review is filed with the Department by the applicant, permittee, licensee, or affected person.
2. An applicant, permittee, licensee, or affected person who wishes to appeal this decision must file a written request for final review with the Clerk of the Board at the following address or by facsimile at 803-898-3393.

Clerk of the Board
SC DHEC
2600 Bull Street
Columbia, SC 29201

3. The request for final review should include the following:
 - a. the grounds on which the Department's decision is challenged and the specific changes sought in the decision
 - b. a statement of any significant issues or factors the Board should consider in deciding how to handle the matter
 - c. a copy of the Department's decision or action under review
4. In order to be timely, a request for final review must be received by the Clerk of the Board within 15 days after notice of the decision has been mailed to the applicant or respondent. If the 15th day occurs on a weekend or State holiday, the request is due to be received by the Clerk of the Board on the next working day. The request for final review must be received by the Clerk of the Board by 5:00 p.m. on the date it is due.
5. If a timely request for final review is filed with the Clerk of the Board, the Clerk will provide additional information regarding procedures.
6. The Board of Health and Environmental Control has 60 days from the date of receipt of a request for final review to conduct a final review conference. The conference may be conducted by the Board, its designee, or a committee of three members of the Board appointed by the chair.
7. If a final review conference is not conducted within 60 days, the Department decision becomes the final agency decision, and a party may request a contested case hearing before the Administrative Law Court within 30 days after the deadline for the final review conference.

The above information is provided as a courtesy; parties are responsible for complying with all applicable legal requirements.

October 31, 2006

New Compliance Requirements:

Facility inspections and monthly reports

Please note that there are several new compliance requirements under the recently issued NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities, SCR100000 (2006 CGP).

- One of the following inspection schedules has been identified in your approved Storm Water Pollution Prevention Plan (SWPPP): Inspections of the site must be conducted at least once every 7 calendar days or at least once every 14 days and within 24 hours of the end of a storm event of 0.5 inches or greater. You must notify the Department (Bureau of Water, Compliance Assurance Division) in writing to switch your inspection schedule.
- Inspections conducted under this requirement must be available with the SWPPP and include at a minimum: a) Inspection date, b) Name, title, and qualifications of inspection personnel, c) Weather information since last inspection, including details of storm events d) Weather information and discharge information observed during the inspection, e) Location of discharges of sediment or pollutants from the site, f) Locations of Best Management Practices (BMPs) that need maintenance, g) Locations of BMPs that failed to operate as designed or were inadequate for a particular location, h) Locations where additional BMPs are needed, i) Corrective action required including changes needed in the SWPPP and implementation dates. **(An inspection form that may be used for these inspections is available at <http://www.scdhec.gov/stormwater> or from the Compliance Assurance Division)**
- For sites disturbing more than 2 acres, these inspections must be conducted by "qualified personnel" (please see section 3.10D of the 2006 CGP for details on "qualified personnel").
- For construction sites disturbing 10 acres or more, a monthly report must be submitted to **SCDHEC, Bureau of Water, Compliance Assurance Division, 2600 Bull St. Columbia, SC 29201** by the 28th day of the following month and, if applicable, the appropriate Municipal Separate Storm Sewer System (MS4) operator. The monthly report must include at a minimum: a) A summary of the inspections conducted during the month, b) A listing of deficiencies and the date noted, c) For deficiencies requiring corrective action, list the name, address, and telephone number or the responsible party, d) Whether the deficiency was listed in a previous monthly report, e) Corrective actions taken and the date the actions were completed, f) Whether the SWPPP was updated to deal with the noted deficiencies, g) A copy of each inspection conducted during the month. In addition, the first monthly report must include all co-permittee agreements and contractor certifications. As co-permittees and contractors are added during the life of the project, applicable agreements and certifications must be submitted with the next monthly report. These must also be available with the SWPPP. If construction has not begun, the monthly report is still required, but it may simply state that construction has not yet started

Note: For construction sites disturbing less than ten (10) acres, DHEC may require monthly reports on either a Project-by-Project basis or Operator-by-Operator basis.



**Notice of Intent (NOI) for Stormwater Discharges from
Large and Small Construction Activities,
NPDES General Permit SCR100000**

For official use only

File number: 40-08-09-08

Permit number: SCR10J889

Submittal package complete: _____

Public Notice Start Date (OCRM only): _____

Submission of an NOI constitutes notice that the entity identified in Section I intends to be authorized under SCR100000. Instructions on page 5.

Date: 11/05/2008

Project/ Site Name: Roper Pond Apartments

County: Richland

Do you want this project to be considered for the Expedited Review Program (ERP)? ☐ Yes ☒ No (See instructions.)
If yes, is the design of this project above regulatory requirements or Low Impact Development? ☐ Yes ☒ No

I. Project Information

Project Owner/ Operator (Company or person): Roper Pond LLC

Company EIN: 20-0806299

Phone: 803-779-1400

Fax: 803-765-9427

Mailing Address: 1407 Main St., Suite 650

City: Columbia

State: SC

Zip: 29201

Permit Contact (if owner is company): Bob Mundy

Phone: _____

Mailing Address: _____

City: _____

State: _____

Zip: _____

Email address (optional): _____

II. Property Information

A. Site Location (street address, nearest intersection, etc.): 6837 North Trenholm Rd.

City/ Town (if in limits): _____

Latitude: 34° 3' 35" N Longitude: -80° 57' 30" W

Tax map # (list all): R16907-01-04

B. Property Owner: _____

Phone: _____

Mailing Address: _____

City: _____

State: _____

Zip: _____

III. Site Information

A. Disturbed area (to the nearest tenth of an acre): 9.6 acres Total area: 12.8 acres

B. Is this project part of a Larger Common Plan for Development or Sale (LCP)? ☐ Yes ☒ No

LCP/ Overall Development Name: _____

Check here if this is the first phase. ☐

Previous state permit/ file number: _____

Previous NPDES coverage number: SCR10

C. Start Date (MM/DD/YYYY): 07/28/2008

Completion Date: 07/28/2009

D. Is this site located on Indian Lands? ☐ Yes ☒ No

If yes, name of reservation. _____

E. Type of Activity (check one):

☐ Institutional

☐ Residential: Single-family

☐ Commercial

☐ Industrial

☐ Linear

☒ Residential: Multi-family

☐ Multi-use (Commercial & Residential)

☐ Other: _____

☐ Site Preparation (No new impervious)

F. Are there any flooding problems downstream of or adjacent to this site? ☐ Yes ☒ No

G. Has S.C. DHEC issued a Notice to Comply or Notice of Violation for this site or LCP? ☐ Yes ☒ No

H. Is any part of the property located inside an MS4 or urbanized area? ☒ Yes ☐ No

If yes, list the MS4 operator or urbanized area name. Richland County

I. List all state and federal environmental permits or approvals applied for or obtained for this site (e.g., RCRA). _____

IV. Waterbody Information

A. Nearest receiving waterbody(s) [RWB]: Cary's Lake

Distance to nearest RWB (feet): 550

Classification of nearest RWB: FW

Next/Nearest named RWB: Jackson Creek

B. 1. Waters of the U.S./ State	On the site?	Delineated/ Identified?	Impacts?	Amount of impacts
a. Jurisdictional wetlands	☒ Yes ☐ No	☒ Yes ☐ No	☒ Yes ☐ No	<u>0.075</u> Ac
b. Non-jurisdictional wetlands	☐ Yes ☒ No	☐ Yes ☐ No	☐ Yes ☐ No	_____ Ac
c. Other Water(s) List: Pond	☒ Yes ☐ No	☒ Yes ☐ No	☐ Yes ☐ No	_____ Ac _____ Feet

2. If yes for impacts in B.1, describe each impact and activity, and list all permits (e.g., USACOE Nationwide permit, DHEC General Permit) and certifications that have been applied for or obtained for each impact.
USACOE Nationwide Permit

C. Impaired Waterbodies (See instructions.)

List the nearest DHEC water quality monitoring station(s) [WQMS(s)] to which construction stormwater (SW) discharges will drain and the corresponding waterbody(s). SC-C0068 Waterbody(s): Forest Lake

1. Is this WQMS(s) listed on the most current 303(d) List for Impaired Waters? ☒ Yes ☐ No
 - a. If yes for 1, list the impairment(s). zinc
 - b. If yes for 1, will the site's construction SW discharges contain any pollutant(s) causing the impairment(s)?
☐ Yes ☒ No
 - c. If yes for b, list the impairment(s) affected by the pollutant(s) referenced in b. _____
 - d. If yes for b, will use of the proposed BMPs ensure that the site's discharges will not contribute to or cause further water quality standard violations for the impairment(s) listed in c? ☐ Yes ☐ No
2. Has a TMDL(s) been developed for this WQMS(s)? ☐ Yes ☒ No
 - a. If yes for 2, list the impairment(s). _____
 - b. If yes for 2, has the standard been attained for all impairment(s)? ☐ Yes ☐ No
 - c. If no for b, will the site's construction SW discharges contain any pollutant(s) causing the impairment(s)?
☐ Yes ☐ No
 - d. If yes for c, are your discharges consistent with the assumptions and requirements of the TMDL(s)?
☐ Yes ☐ No

D. 1. Are S.C. Navigable Waters (SCNW) on the site? ☐ Yes ☒ No

- a. If yes for 1, list the name of the SCNW: _____
- b. If yes for 1, will any construction activities cross over or occur in, under, or through the SCNW? ☐ Yes ☐ No
- c. If yes for b, then describe activities. _____
- d. If yes for b, are the activities in SCNW covered under a DHEC General Permit or other DHEC permit?
☐ Yes ☐ No
- e. If no for d, has an SCNW permit been applied for or issued for the site?
☐ Yes, for all activities ☐ Yes, for some activities ☐ No
- f. If yes for d or e, list permit number(s) and corresponding activities. _____

V. Operator Information

- A. SWPPP Preparer:** James M. Futter S.C. Registration #: 8367
Company/ Firm: BP Barber S.C. COA #: _____
Mailing Address: P.O. Box 1116 City: Columbia State: SC Zip: 29203
Phone: (Day) 803-254-4400 (Mobile) _____ (Fax) _____
Email address (optional): jfutter@bpbarber.com
- B. Operator of Day-to-Day Site Activities [ODSA] (Company or person):** _____
Mailing Address: _____ City: _____ State: _____ Zip: _____
Phone: _____ Fax: _____
Site Contact (if ODSA is company): _____ Phone: _____

VI. Signatures and Certifications: DO NOT SIGN IN BLACK INK!

- A.** One copy of the SWPPP, all specifications and supporting calculations, forms, and reports are herewith submitted and made a part of this application. I have placed my signature and seal on the design documents submitted signifying that I accept responsibility for the design of the system. Further, I certify to the best of my knowledge and belief that the design is consistent with the requirements of Title 48, Chapter 14 of the Code of Laws of SC, 1976 as amended, pursuant to Regulation 72-300 et seq., and in accordance with the terms and conditions of SCR100000. (This should be person identified in Section V.A.)
Check one. ☐ Engineer ☐ Tier B Surveyor ☐ Landscape Architect

James M. Futter James M. Futter 8367
Printed name of SWPPP Preparer Signature of SWPPP Preparer S.C. Registration #

- B.** I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

I hereby certify that all land-disturbing construction and associated activity pertaining to this site shall be accomplished pursuant to and in keeping with the terms and conditions of the approved plans and SCR100000. I also certify that a responsible person will be assigned to the project for day-to-day control. I hereby grant authorization to the to S.C. Department of Health and Environmental Control (DHEC) and/or the local implementing agency the right of access to the site at all times for the purpose of on site inspections during the course of construction and to perform maintenance inspections following the completion of the land-disturbing activity. (See Section 122.22 of S.C. Reg. 61-9 for signatory authority information.)

Bob Mundy
Printed name of Project Owner/Operator

Tom
Signature of Project Owner/ Operator

11/5/08
Date

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown,

Petitioners,

vs.

Roper Pond, LLC, and South Carolina Department of Health and Environmental Control,

Respondents.

Docket No. 09-ALC-07-____-CC

**REQUEST FOR
CONTESTED CASE HEARING**

TO: THE ADMINISTRATIVE LAW COURT AND THE RESPONDENTS:

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, pursuant to Administrative Law Court Rule 11, hereby request a contested case hearing in connection with the decision of the South Carolina Department of Health and Environmental Control to approve a Stormwater Pollution Prevention Plan and the granting of coverage under the NPDES Permit for Storm Water Discharges from Large and Small Construction Activities SCR100000, together with the water quality certification issued for a US Army Corps of Engineers permit that is a part of the approval process for this project.

In support of this request the Petitioners submit the following:

THE PETITIONERS

1. The Town of Arcadia Lakes is a municipality organized and existing under the laws of the State of South Carolina. The Town is located around a series of lakes within the Gills Creek watershed, and these lakes are very important to the quality of life of the citizens of the Town.

2. Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown are citizens and residents of the Town of Arcadia Lakes in Richland County, South Carolina; they own property on or near the lakes in the area, and they use and enjoy these lakes for a variety of recreational, environmental and aesthetic purposes.

THE PROJECT AND RESOURCES AT ISSUE

3. Roper Pond, LLC, is the entity that submitted an application for storm water permits and approvals for the construction of a project known as Roper Pond Apartments.

4. Representatives of Roper Pond, LLC, have stated that they plan to construct a high density apartment complex on a tract of land consisting of approximately 12.75 acres lying immediately adjacent to the Town of Arcadia Lakes.

5. The project includes a number of alterations to a pond lying on the property. The pond is a part of the Gills Creek watershed and drains into Cary Lake, a lake within the watershed lying within the town limits of the Town of Arcadia Lakes. The proposed alterations include filling of portions of the pond and wetlands at the edges of the pond and the excavation of a substantial portion of the pond to convert the pond from a productive shallow picturesque lily-pad pond into a typical unsightly and unproductive storm water retention basin.

6. The pond proposed for alterations presently functions as a significant bird habitat and a highly productive wetland providing significant public benefits in filtration of storm waters and improving the quality of waters within the Gills Creek basin.

7. The Gills Creek basin is currently listed as an impaired waterway under Section 303(d) of the federal Clean Water Act, and significant efforts are being made to improve the waters of the Gills Creek watershed and to remedy the problems that have impaired this watershed. Activities such as filling and excavating functional ponds in this watershed will only add to the water quality problems within the Gills Creek watershed.

THE AGENCY PROCEEDING

8. The DHEC staff decision to issue the certification and permit was made on December 15, 2008. The Petitioners filed a timely request for a final review conference before the DHEC Board, but the Board did not conduct a final review conference. Copies of the staff decision and the letter stating that the Board will not conduct a review conference are attached hereto.

GROUND FOR APPEAL

9. The Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown are informed and believe that the permit, certification and approvals were issued in violation of DHEC Regulations 61-9, 61-68 and 61-101, in the following respects:

A. Upon information and belief, Roper Pond, LLC, submitted incorrect and incomplete information to DHEC. Roper Pond, LLC's Stormwater Pollution Prevention Plan

(SWPPP) is deficient and DHEC should not have issued a Construction NPDES Permit for this site:

(1) There are significant defects in the construction and post construction portions of Roper's SWPPP. The silt fence shown on drawing C2 is placed inside the Wetlands Buffer, too close to the wetlands, and in some areas through the wetlands. The Wetlands Buffer area must remain undisturbed to be effective.

(2) The September 2, 2008 Richland County conditional approval states that the maximum driveway width be 24 feet. The Roper drawing C4 shows a 26 foot width. This adds significant impervious area which would cause additional stormwater runoff and additional pollutants. The County conditional approval requires "Preservation of trees in the green area next to the pond." Based on the existing condition shown on drawing C1 and the Site Planting Plan, it appears that no trees are being preserved in the green area around the pond. Grubbing existing trees in the area around the pond defeats the usefulness of a Wetlands Buffer and will cause sediment to enter the pond.

(3) Roper Pond, LLC's documents note that zinc is a problem in Cary Lake, but incorrectly states that no zinc will come from its development. It is well documented that zinc is discharged from roof drains of large buildings and from large parking lot areas.

(4) DHEC is not authorized to issue an NPDES Construction Permit where such construction or post construction condition would "cause or contribute" to impairment of the receiving water body, unless, the MS4 is in compliance with its Stormwater Management Plan (SWMP). On its website, Richland County states, "Q. Why is Richland County proposing new stormwater regulations, to include buffers? A. Because Richland County is in violation of

the clean water act and has been cited by DHEC...And as a result of this violation, we have agreed to change our regulations to address the cited deficiencies. These changes would help Richland County improve the water quality in our community for our residents.” Therefore DHEC cannot issue a new construction permit until the County adopts and applies the improved ordinance.

(5) Roper Pond, LLC’s calculated trapping efficiency for the post construction water quality devices (i.e., Best Management Practices (BMPs)) is flawed. First, the calculations do not properly and adequately address capture of the “first flush” stormwater runoff volume that would come from the site; and thus, the devices are not of adequate size to capture what is documented to be the most significant portion of a runoff event for transporting pollutants to the receiving water. Second, Roper Pond, LLC, assumes an even distribution of particles, 20% for each of the five particle sizes. This assumed particle distribution is incorrect and yields an inaccurate and incorrect particle trapping efficiency for these BMPs. Also, no oil and grease trapping efficiency was calculated. Leaking vehicle crankcase and transmission oils in parking lots would contain and transport zinc if not properly captured. DHEC should not have approved the Construction NPDES Permit because of these significant deficiencies.

B. The Petitioners are informed and believe that Roper Pond, LLC, submitted materially incorrect information and omitted material information in its submissions to Richland County, DHEC, and the Corps:

(1) In its pre-construction notification to the Corps, Roper Pond, LLC, failed to make it clear that it intended to construct a residential development. Roper requested a Nationwide 39 permit for a commercial development, based on filling of not more than 0.075

acres of wetlands. If a Nationwide Permit had been applicable here, Roper should have applied for a Nationwide^f 29 permit for residential development. Accordingly, DHEC erroneously issued a 401 water quality certification for this project, and then compounded the error by relying on the water quality certification in approving the project's storm water plan and permit.

(2) Roper Pond, LLC, however, should have applied for an Individual 404 Permit. Roper Pond, LLC, told the Corps it would only impact 0.075 acres of wetlands, but failed to advise the Corps that its design called for dredging the existing Roper Pond nor that it intended to lower the existing pond water level by 3.5 feet. The stream thread of Roper Pond exceeds 350 feet. For any stream alteration exceeding 299 feet, one must apply for an Individual 404 Permit. If Roper Pond, LLC, had properly applied for an Individual Permit, DHEC would have had to evaluate and determine whether to issue a 401 water quality Certification for this permit. DHEC would have also been required to place the project on public notice and provide an opportunity for public comments and appeal. Additionally, the Corps would have had to place the project on public notice.

(3) Roper Pond, LLC's proposed permanent lowering of the pond water level by 3.5 feet, would cause a significantly larger area of wetlands to be impacted than what Roper submitted. Sidecasting and incidental fallback of dredged material would cause the filling of some of the wetland ribbon around the pond, access of equipment into and out of the pond area would fill wetlands, and draining of wetlands, by permanently lowering the pond elevation, would have the equivalent effect of filling ribbon wetlands around the pond and in the larger wetland area upgradient of the pond. Therefore, Roper misled the Corps and both DHEC and the public were denied opportunities to participate regarding water quality by Roper's incorrect and

incomplete application.

C. The impacts of this project were considered by DHEC in a piecemeal fashion and instead should have been considered as part of the comprehensive review required by DHEC Regulation 61-101.

D. The approvals and permit were issued in reliance upon a Nationwide Permit issued by the US Army Corps of Engineers that does not authorize the types of alterations to the pond and wetlands that Roper Pond, LLC, propose to make on this site.

E. The approvals and permit were issued in reliance upon a DHEC 401 Water Quality Certification that was issued without any public notice or opportunity for public comment prior to the issuance of the storm water approvals; the DHEC 401 Water Quality Certification was erroneously issued for a Nationwide Permit under the Clean Water Act Section 404 program administered by the US Army Corps of Engineers that does not authorize the types of alterations to the pond and wetlands that Roper Pond, LLC, propose to make on this site. DHEC failed to make a comprehensive review of the project when it certified the Nationwide Permit approval; the project also violates DHEC water quality certification rules in that:

(1) the project would permanently alter the aquatic ecosystem in the vicinity of the project such that its functions and values would be eliminated or impaired, in violation of DHEC Regulation 61-101.F.5.(a) ;

(2) there are feasible alternatives to the activity, which would reduce adverse consequences on water quality and classified uses, and therefore the approval of this project violates DHEC Regulation 61-101.F.5(b);

(3) the proposed activity adversely impacts special or unique habitats, in

violation of DHEC Regulation 61-101.F.5.(d).

F. The project proposes to fill and make significant alterations to a water of the State, and to convert a naturalized water of the State into a storm water retention pond instead of retaining the storm water within upland constructed retention areas; this proposal violates DHEC Regulations 61-9 and 61-68;

G. The project calls for lowering the water level in order to provide storm water retention capacity, but the Department failed to take into account the fact that lowering the water level, which would be accomplished by excavating the bottom level of the pond, will result in the drainage of wetlands associated with the pond, altering the hydrology of those wetlands and causing additional adverse impacts to these wetlands, all in violation of DHEC Regulations 61-9 and 61-101.

H. The issuance of a 401 water quality certification without first providing public notice and opportunity for public comment violated the rights of the Petitioners to due process of law under Article I, Section 22 of the South Carolina Constitution.

I. The approved permit violates Regulation 61-9 in that the plans fail to control the first flush volumes and thus this project would have significant impacts upon water quality both within the existing pond and downstream portions of the Gills Creek watershed.

J. The approved permit violates Regulation 61-9 in that the Department gave approval to plans that include an arbitrary proposed particle size distribution in the calculations used by the design engineer for post-development storm water runoff.

K. The approved permit violates Regulations 61-9, 61-68, and 61-101 in that it fails to take into account a number of significant water quality problems associated with the high

density design of the project proposed for this site.

STANDING

10. The Town of Arcadia Lakes has its own "MS4" stormwater permit program, and the implementation of this program will be negatively affected by the proposed alterations of Roper Pond. The Roper Pond project will also have adverse impacts on the Town's efforts to improve water quality in Cary Lakes and other waters within its jurisdiction.

11. Citizens of the Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown use and enjoy the ponds and waters of the Gills Creek watershed, including the pond on the subject property and areas downstream that will be adversely impacted by this project, for a variety of recreational, environmental, and aesthetic purposes.

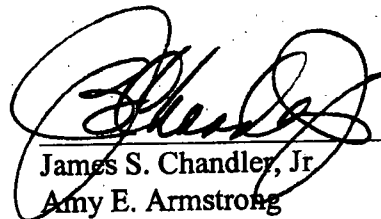
12. As a direct and proximate result of the violations set forth above, the Citizens of the Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown will suffer harm to their recreational, environmental, aesthetic and other interests.

RELIEF REQUESTED

WHEREFORE, Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen

Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown request that the Administrative Law Court conduct a contested case hearing and thereafter issue an order reversing the proposed decision to issue the permit and approvals and granting such other and further relief as the Court may deem just and appropriate.

Respectfully submitted,



James S. Chandler, Jr.

Amy E. Armstrong

**SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT**

Mailing address: Post Office Box 1380
Pawleys Island, SC 29585
Office address: 430 Highmarket Street
Georgetown, SC 29440
Telephone (843) 527-0078
FAX (843) 527-0540

Attorneys for the Petitioners

Georgetown, South Carolina

February 16, 2009



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

December 15, 2008

BOB MUNDY
ROPER POND LLC
1401 MAIN ST STE 650
COLUMBIA SC 29201

RE: ROPER POND APARTMENTS, Richland County
File number: 40-08-09-08

Dear Bob Mundy:

The Department of Health and Environmental Control (Department or DHEC) has approved the Stormwater Pollution Prevention Plan (SWPPP) for the referenced project on **December 15, 2008**. Based on your submission of the Notice of Intent (NOI) and in accordance with the NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities SCR100000 (2006 CGP), this project has been granted coverage under the 2006 CGP. This project's general permit coverage number is **SCR10J889**. The total disturbed area for this site is **9.6 acres**. This NPDES coverage expires on **12/15/2013**, 5 years from the date of issuance.

The inspections for this site must be performed by qualified personnel who meets the requirements list in Section 3.10.D of the 2006 CGP. Qualified personnel must be one of the following:

1. SWPPP preparer
2. Person under direct supervision of SWPPP preparer
3. Person who has been certified through a Construction Site Inspector Certification Course that has been approved by DHEC (see our website for a list of approved courses)
4. Person with registration equivalent of SWPPP preparer
5. Person under direct supervision of person with registration equivalent to SWPPP preparer

An as-built survey, signed and sealed by a S.C. Licensed Land Surveyor, should be submitted for the 1 structure(s) on this site. The survey(s) should show grades, contours, and depths for all structures and should include the elevations and dimensions of all outlet structures, including but not limited to pipes, orifices, risers, weirs, and emergency spillways. A statement signed by the project's S.C. Registered Engineer indicating that the structure(s) was installed and is operating as shown on approved plans and in approved calculations is required. If the elevations or dimensions of the structures listed above do not match those used in the approved plans, provide a certification statement signed by the projects S.C. Registered Engineer indicating that the structure, as built, will function as shown in approved calculations. A new analysis of the structure (routing) may be necessary. The as-built survey and/ or analysis must be accepted by the Department before a Notice of Termination (NOT) can be submitted.

"Because this project impacts waters of the U.S./ State, make sure you obtain all necessary permits and certifications from USACOE and SC DHEC 401 Water Quality Certification, Standards, i Section before land-disturbing activities begin in those areas."

The 2006 CGP can be downloaded at the following website:

<http://www.scdhec.gov/environment/water/docs/finalcgp.pdf> or you may request a copy from us via email (stormwatercgp@dhec.sc.gov). You are responsible for ensuring your contractor(s) complies with the approved SWPPP and the minimum requirements of the 2006 CGP. Also, you are responsible for overall compliance with the Storm Water Management and Sediment Reduction Act of 1991 (1991 Act) and the Federal Clean Water Act (CWA).

You must notify this DHEC EQC Regional Office prior to starting any land-disturbing activity. The address and telephone number of the EQC office are as follows:

Columbia EQC Office
BUILDING 5 PO BOX 156
STATE PARK SC 29147-0156
803-896-0620

You should be aware that this approval is only applicable for the SWPPP that was submitted for this project. Any additional construction or land disturbing activity beyond the scope of the approved plans is not authorized. Any future work for this project not shown on the stamped, approved plans will require that you submit another site plan for review and approval. All major modifications require review and approval by the Department. Minor modifications to the approved SWPPP may be made by the SWPPP preparer and do not require review and approval by the Department; these changes should be signed and dated by the SWPPP preparer. If you have a question about whether a modification is major or minor, contact the Stormwater Permitting Section at (803) 898-4300.

Three (3) sets of stamped, approved plans are being provided to your engineer. A copy of the stamped, approved SWPPP (including a copy the 2006 CGP and signed co-permittee and contractor certifications), NOI, and CGP coverage letter from DHEC must be retained at the construction site (or accessible within 30 minutes during normal business hours) from the date of commencement of construction activities to the date of final stabilization. A copy of the stamped, approved SWPPP must be available at a central location on-site for the use of all those identified as having responsibilities under the SWPPP whenever they are on the construction site. If an on-site location is unavailable to store the SWPPP when no personnel are present, notice of the plan's location must be posted near the main entrance at the construction site.

All contractors who will conduct land-disturbing activities at the site must sign a certification statement as a co-permittee or as a contractor who is not a co-permittee. You are responsible for any contractor who is not a permittee. You are also responsible for listing all contractors in the SWPPP and for holding a pre-construction conference with each co-permittee and contractor who is not a co-permittee before they can conduct land-disturbing activity at the site.

The Department may conduct periodic inspections of your site. Any violations found during these inspections may result in enforcement action. Failure to comply with the approved SWPPP or the minimum requirements of the 2006 CGP, 1991 Act, or CWA may subject you to applicable penalties.

This NPDES coverage should be terminated by the permittee when one of the conditions listed in Section 5.1 of the 2006 CGP has been met. You must submit a Notice of Termination (NOT) to cancel your NPDES coverage under the 2006 CGP. Please see section 5.1 of the 2006 CGP for more information about termination of coverage.

You are responsible for obtaining any other federal, state, or local permit that may be required for this project. Please note we have not sent a copy of this letter to any county or city building official. You must send a copy of this letter to these agencies, if necessary.

Please see the enclosed "Notice of Appeal Procedure" document for information about the procedures for appealing this NPDES coverage. Also, see the enclosed document from the S.C. DHEC Compliance Assurance Division detailing some of the compliance requirements of the 2006 CGP.

If you have any questions or cannot access the referenced websites, please call me at 803-898-0439.

Sincerely,



Jill C. Stewart, P.E.

Stormwater Permitting Section

CC: James M Futter-BP BARBER & ASSOCIATES INC
Region 3, Columbia EQC Office



Notice of Intent (NOI) for Stormwater Discharges from
Large and Small Construction Activities,
NPDES General Permit SCR100000

For official use only

File number: 40-08-09-08

Permit number: SCR10 J889

Submission package complete: _____

Public Notice Start Date (OCRM only): _____

For official use only

SOUTH CAROLINA
DEPT OF HEALTH AND ENVIRONMENTAL CONTROL
ENVIRONMENTAL QUALITY CONTROL
STORMWATER PERMITTING SECTION
APPROVED - FOR CONSTRUCTION ONLY

DHEC PERMIT #: SCR10J889

FILE #: 40-08-09-08

DATE ISSUED: 12/15/08

BY: [Signature]

Submission of an NOI constitutes notice that the entity identified in Section I intends to be authorized under SCR100000. Instructions on page 5.

Date: 11/05/2008

Project/ Site Name: Roper Pond Apartments

County: Richland

Do you want this project to be considered for the Expedited Review Program (ERP)? ☐ Yes ☒ No (See instructions.)

If yes, is the design of this project above regulatory requirements or Low Impact Development? ☐ Yes ☐ No

I. Project Information

Project Owner/ Operator (Company or person): Roper Pond LLC

Company EIN: 20-0806299

Phone: 803-779-1400

Fax: 803-765-9427

Mailing Address: 1407 Main St., Suite 650

City: Columbia

State: SC

Zip: 29201

Permit Contact (if owner is company): Bob Mundy

Phone: _____

Mailing Address: _____

City: _____

State: _____

Zip: _____

Email address (optional): _____

II. Property Information

A. Site Location (street address, nearest intersection, etc.): 6837 North Trenholm Rd.

City/ Town (if in limits): _____

Latitude: 34° 3' 35" N Longitude: -80° 57' 30" W

Tax map # (list all): R16907-01-04

B. Property Owner: _____

Phone: _____

Mailing Address: _____

City: _____

State: _____

Zip: _____

III. Site Information

A. Disturbed area (to the nearest tenth of an acre): 9.6 acres Total area: 12.8 acres

B. Is this project part of a Larger Common Plan for Development or Sale (LCP)? ☐ Yes ☒ No

LCP/ Overall Development Name: _____

Check here if this is the first phase. ☐

Previous state permit/ file number: _____

Previous NPDES coverage number: SCR10 ☐ ☐ ☐ ☐

Completion Date: 07/28/2009

C. Start Date (MM/DD/YYYY): 07/28/2008

D. Is this site located on Indian Lands? ☐ Yes ☒ No

If yes, name of reservation: _____

E. Type of Activity (check one):

☐ Commercial

☐ Industrial

☐ Institutional ☐ Residential: Single-family

☐ Multi-use (Commercial & Residential)

☐ Other: _____

☐ Linear ☒ Residential: Multi-family

☐ Site Preparation (No new impervious)

F. Are there any flooding problems downstream of or adjacent to this site? ☐ Yes ☒ No

G. Has S.C. DHEC issued a Notice to Comply or Notice of Violation for this site or LCP? ☐ Yes ☒ No

H. Is any part of the property located inside an MS4 or urbanized area? ☒ Yes ☐ No

If yes, list the MS4 operator or urbanized area name: Richland County

I. List all state and federal environmental permits or approvals applied for or obtained for this site (e.g., RCRA): _____

IV. Waterbody Information

A. Nearest receiving waterbody(s) [RWB]: Cary's Lake

Distance to nearest RWB (feet): 550

Classification of nearest RWB: FW

Next/Nearest named RWB: Jackson Creek

B. 1. Waters of the U.S./ State	On the site?	Delineated/ Identified?	Impacts?	Amount of impacts
a. Jurisdictional wetlands	☒ Yes ☐ No	☒ Yes ☐ No	☒ Yes ☐ No	<u>0.075</u> Ac
b. Non-jurisdictional wetlands	☐ Yes ☒ No	☐ Yes ☐ No	☐ Yes ☐ No	_____ Ac
c. Other Water(s) List: Pond	☒ Yes ☐ No	☒ Yes ☐ No	☐ Yes ☐ No	_____ Ac _____ Feet

2. If yes for impacts in B.1., describe each impact and activity, and list all permits (e.g., USACOE Nationwide permit, DHEC General Permit) and certifications that have been applied for or obtained for each impact.
USACOE Nationwide Permit

C. Impaired Waterbodies (See instructions.)

List the nearest DHEC water quality monitoring station(s) [WQMS(s)] to which construction stormwater (SW) discharges will drain, and the corresponding waterbody(s). SC-C0068 Waterbody(s): Forest Lake

1. Is this WQMS(s) listed on the most current 303(d) List for Impaired Waters? ☒ Yes ☐ No
 - a. If yes for 1, list the impairment(s). zinc
 - b. If yes for 1, will the site's construction SW discharges contain any pollutant(s) causing the impairment(s)?
☐ Yes ☒ No
 - c. If yes for b, list the impairment(s) affected by the pollutant(s) referenced in b.
 - d. If yes for b, will use of the proposed BMPs ensure that the site's discharges will not contribute to or cause further water quality standard violations for the impairment(s) listed in c? ☐ Yes ☐ No
2. Has a TMDL(s) been developed for this WQMS(s)? ☐ Yes ☒ No
 - a. If yes for 2, list the impairment(s).
 - b. If yes for 2, has the standard been attained for all impairment(s)? ☐ Yes ☐ No
 - c. If no for b, will the site's construction SW discharges contain any pollutant(s) causing the impairment(s)?
☐ Yes ☐ No
 - d. If yes for c, are your discharges consistent with the assumptions and requirements of the TMDL(s)?
☐ Yes ☐ No

D. 1. Are S.C. Navigable Waters (SCNW) on the site? ☐ Yes ☒ No

- a. If yes for 1, list the name of the SCNW:
- b. If yes for 1, will any construction activities cross over or occur in, under, or through the SCNW? ☐ Yes ☐ No
- c. If yes for b, then describe activities.
- d. If yes for b, are the activities in SCNW covered under a DHEC General Permit or other DHEC permit?
☐ Yes ☐ No
- e. If no for d, has an SCNW permit been applied for or issued for the site?
☐ Yes, for all activities ☐ Yes, for some activities ☐ No
- f. If yes for d or e, list permit number(s) and corresponding activities.

V. Operator Information

- A. SWPPP Preparer: James M. Futter S.C. Registration #: 8367
Company/ Firm: BP Barber S.C. COA #:
Mailing Address: P.O. Box 1116 City: Columbia State: SC Zip: 29203
Phone: (Day) 803-254-4400 (Mobile) (Fax)
Email address (optional): jfutter@bpbarber.com
- B. Operator of Day-to-Day Site Activities [ODSA] (Company or person):
Mailing Address: City: State: Zip:
Phone: Fax:
Site Contact (If ODSA is company): Phone:

VI. Signatures and Certifications: DO NOT SIGN IN BLACK INK!

- A. One copy of the SWPPP, all specifications and supporting calculations, forms, and reports are herewith submitted and made a part of this application. I have placed my signature and seal on the design documents submitted signifying that I accept responsibility for the design of the system. Further, I certify to the best of my knowledge and belief that the design is consistent with the requirements of Title 48, Chapter 14 of the Code of Laws of SC, 1976 as amended, pursuant to Regulation 72-300 et seq., and in accordance with the terms and conditions of SCR100000. (This should be person identified in Section V.A.)
Check one. ☐ Engineer ☐ Tier B Surveyor ☐ Landscape Architect

James M. Futter
Printed name of SWPPP Preparer

James M. Futter
Signature of SWPPP Preparer

8367
S.C. Registration #

- B. I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

I hereby certify that all land-disturbing construction and associated activity pertaining to this site shall be accomplished pursuant to and in keeping with the terms and conditions of the approved plans and SCR100000. I also certify that a responsible person will be assigned to the project for day-to-day control. I hereby grant authorization to the to S.C. Department of Health and Environmental Control (DHEC) and/or the local implementing agency the right of access to the site at all times for the purpose of on site inspections during the course of construction and to perform maintenance inspections following the completion of the land-disturbing activity. (See Section 122.22 of S.C. Reg. 61-9 for signatory authority information.)

Bob Mundy
Printed name of Project Owner/Operator

Bob Mundy
Signature of Project Owner/Operator

11/5/08
Date

BOARD:
Paul C. Aughtery, III
Chairman
Edwin H. Cooper, III
Vice Chairman
Steven G. Kiser
Secretary



C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

BOARD:
Henry C. Scott
M. David Mitchell, MD
Glenn A. McCall
Coleman K. Buckhouse, MD

S.C. Board of Health and Environmental Control; Telephone (803) 898-3309 Fax: (803) 898-3393

January 14, 2009

U.S. Mail - CERTIFIED - Return Receipt

91 7108 2133 3935 6630 6871

Richard W. Thomas, Jr.
Mayor of Arcadia Lakes
6626A Arcadia Woods Road
Columbia, SC 29206

Via Interagency Mail Delivery

Stephen P. Hightower, Esquire
SCDHEC - Office of General Counsel
2600 Bull Street
Columbia, SC 29201

RE: **Docket No. 08-RFR-148 - Request review of staff decision dated December 15, 2008, to grant approval of the Stormwater Pollution Prevention Plan for Roper Pond Apartments under NPDES General Permit for Storm Water Discharge from Large and Small Construction Activities. Project coverage number is SCR10JB89.**

The S.C. Board of Health and Environmental Control decided on January 8, 2009, not to conduct a Final Review Conference on the above-referenced matter.

S.C. Code Section 44-1-60(F), 2006 Act No. 387, Section 48, provides, "If a final review conference is not conducted within sixty days, the department decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court, in accordance with the Administrative Procedures Act, within thirty days after the deadline for the final review conference."

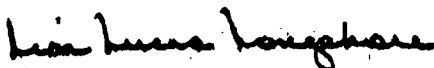
A request for a contested case hearing before the Administrative Law Court (ALC) must be filed in accordance with the Rules of the ALC, including payment of the ALC's filing fee, at the following address:

Clerk's Office
South Carolina Administrative Law Court
Edgar A. Brown Building
1205 Pendleton St., Suite 224
Columbia, SC 29201

The ALC's Notice of Request for Contested Case Hearing form and the Rules of the ALC can be found at the ALC's website: <http://www.scalc.net>. Further information on filing a request for a contested case hearing before the ALC may be obtained by calling the Clerk's Office at the Administrative Law Court (803-734-0550).

If a party files a request for a contested case hearing with the ALC, the party must serve a copy of the request on DHEC and any other parties at the same time the request is filed with the ALC. A copy of the request for a contested case hearing must be delivered or mailed to DHEC at the address at the top of this memorandum.

Sincerely,



Lisa Lucas Longshore
Clerk

The above information on filing a request for a contested case hearing before the Administrative Law Court is provided as a courtesy; parties before the ALC are responsible for complying with all applicable requirements of the Court.

OCG # 20027

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STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda)
Z. Jackson, Robert E. Williams, Jr., Barbara S.)
Williams, Elizabeth M. Walker, Louis E. Spradlin,)
Mary Helen Spradlin, Thomas Hutto Utsey, Tony)
Sinclair, Aaron Small, Bette Small, Gene F. Starr,)
M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L.)
Marcus, and Steven Brown,)

Petitioners,)

vs.)

Roper Pond, LLC, and South Carolina Department)
of Health and Environmental Control,)

Respondents.)

Docket No. 09-ALC-07-____-CC

CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the Request for Contested Case Hearing in this matter upon counsel for agency and the permittee, by placing same in the United States Mail, First Class Postage Prepaid, addressed to:

Bob Mundy
Roper Pond, LLC
1401 Main Street, Suite 650
Columbia, SC 29201

Carl Roberts, Esquire
DHEC General Counsel
2600 Bull Street
Columbia, SC 29201



James S. Chandler, Jr.
Attorney for the Appellants

Georgetown, South Carolina

February 16, 2009

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda)	Docket No. 09-ALC-07-0069-CC
Z. Jackson, Robert E. Williams, Jr., Barbara S.)	
Williams, Elizabeth M. Walker, Louis E. Spradlin,)	
Mary Helen Spradlin, Thomas Hutto Utsey, Tony)	
Sinclair, Aaron Small, Bette Small, Gene F. Starr,)	
M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L.)	
Marcus, and Steven Brown,)	
)	
Petitioners,)	PREHEARING STATEMENT
)	OF
vs.)	PETITIONERS
)	
South Carolina Department of Health and)	
Environmental Control and Roper Pond, LLC,)	
)	
Respondents.)	
)	

The Petitioners submit the following as their Prehearing Statement:

1. The nature of this proceeding.

This proceeding is a contested case appeal of the decision of the South Carolina Department of Health and Environmental Control ("DHEC") to issue a storm water permit (including a Stormwater Pollution Prevention Plan and the granting of coverage under the NPDES Permit for Storm Water Discharges from Large and Small Construction Activities SCR100000) and 401 water quality certification to Roper Pond, LLC, for the proposed construction of a project known as Roper Pond Apartments, a high density apartment complex, on a tract of land consisting of approximately 12.75 acres lying immediately adjacent to the Town of Arcadia Lakes.

2. The statutory provision(s) conferring subject matter jurisdiction to the Administrative Law Court (Court) and other applicable statutes and regulations.

Subject matter jurisdiction: (1) S.C. Administrative Procedures Act, S.C. Code Ann. §§ 1-23-310, 1-23-370, 1-23-600; (2) the Pollution Control Act, S.C. Code Ann. § 48-1- 10, *et seq.*; and (3) S.C. Code Ann. § 44-1-60 2006 Act No. 387.

Other applicable statutes and regulations: (1) the Stormwater Management and Sediment Reduction Act of 1991, S.C. Code Ann. §§ 48-14-10, *et seq.*; (2) Stormwater regulations, S.C.

Code Ann. Regs. §§ 72-300 through 316; (3) S.C. Pollution Control Act, S.C. Code Ann. §§ 48-1-20, *et seq.*; (4) DHEC Regulations for NPDES permits, S.C. Code Ann. § 61-9.; DHEC Regulations for 401 water quality certifications, SC Code Ann. Regs. § R.61-101.

3. The issues to be presented for determination, including any claims or defenses expected to be raised.

A. Whether Roper Pond, LLC, submitted incorrect and incomplete information to DHEC.

B. Whether Roper Pond, LLC's Stormwater Pollution Prevention Plan (SWPPP) is deficient and DHEC should not have issued a Construction NPDES Permit for this site because:

1. There are significant defects in the construction and post construction portions of Roper's SWPPP. The silt fence shown on drawing C2 is placed inside the Wetlands Buffer, too close to the wetlands, and in some areas through the wetlands. The Wetlands Buffer area must remain undisturbed to be effective.

2. The September 2, 2008 Richland County conditional approval states that the maximum driveway width be 24 feet. The Roper drawing C4 shows a 26 foot width. This adds significant impervious area which would cause additional stormwater runoff and additional pollutants. The County conditional approval requires "Preservation of trees in the green area next to the pond." Based on the existing condition shown on drawing C1 and the Site Planting Plan, it appears that no trees are being preserved in the green area around the pond. Grubbing existing trees in the area around the pond defeats the usefulness of a Wetlands Buffer and will cause sediment to enter the pond.

3. Roper Pond, LLC's documents note that zinc is a problem in Cary Lake, but incorrectly states that no zinc will come from its development. It is well documented that zinc is discharged from roof drains of large buildings and from large parking lot areas.

4. DHEC is not authorized to issue an NPDES Construction Permit where such construction or post construction condition would "cause or contribute" to impairment of the receiving water body, unless, the MS4 is in compliance with its Stormwater Management Plan (SWMP). On its website, Richland County states, "Q. Why is Richland County proposing new stormwater regulations, to include buffers? A. Because Richland County is in violation of the clean water act and has been cited by DHEC...And as a result of this violation, we have agreed to change our regulations to address the cited deficiencies. These changes would help Richland County improve the water quality in our community for our residents." Therefore DHEC cannot issue a new construction permit until the County adopts and applies the improved ordinance.

5. Roper Pond, LLC's calculated trapping efficiency for the post construction water quality devices (i.e., Best Management Practices (BMPs)) is flawed. First, the calculations do not properly and adequately address capture of the "first flush" stormwater runoff volume that

would come from the site; and thus, the devices are not of adequate size to capture what is documented to be the most significant portion of a runoff event for transporting pollutants to the receiving water. Second, Roper Pond, LLC, assumes an even distribution of particles, 20% for each of the five particle sizes. This assumed particle distribution is incorrect and yields an inaccurate and incorrect particle trapping efficiency for these BMPs. Also, no oil and grease trapping efficiency was calculated. Leaking vehicle crankcase and transmission oils in parking lots would contain and transport zinc if not properly captured. DHEC should not have approved the Construction NPDES Permit because of these significant deficiencies.

C. Whether Roper Pond, LLC, submitted materially incorrect information and omitted material information in its submissions to Richland County, DHEC, and the Corps:

1. In its pre-construction notification to the Corps, Roper Pond, LLC, failed to make it clear that it intended to construct a residential development. Roper requested a Nationwide 39 permit for a commercial development, based on filling of not more than 0.075 acres of wetlands. If a Nationwide Permit had been applicable here, Roper should have applied for a Nationwide 29 permit for residential development. Accordingly, DHEC erroneously issued a 401 water quality certification for this project, and then compounded the error by relying on the water quality certification in approving the project's storm water plan and permit.

2. Roper Pond, LLC, however, should have applied for an Individual 404 Permit. Roper Pond, LLC, told the Corps it would only impact 0.075 acres of wetlands, but failed to advise the Corps that its design called for dredging the existing Roper Pond nor that it intended to lower the existing pond water level by 3.5 feet. The stream thread of Roper Pond exceeds 350 feet. For any stream alteration exceeding 299 feet, one must apply for an Individual 404 Permit. If Roper Pond, LLC, had properly applied for an Individual Permit, DHEC would have had to evaluate and determine whether to issue a 401 water quality Certification for this permit. DHEC would have also been required to place the project on public notice and provide an opportunity for public comments and appeal. Additionally, the Corps would have had to place the project on public notice.

3. Roper Pond, LLC's proposed permanent lowering of the pond water level by 3.5 feet, would cause a significantly larger area of wetlands to be impacted than what Roper submitted. Sidecasting and incidental fallback of dredged material would cause the filling of some of the wetland ribbon around the pond, access of equipment into and out of the pond area would fill wetlands, and draining of wetlands, by permanently lowering the pond elevation, would have the equivalent effect of filling ribbon wetlands around the pond and in the larger wetland area upgradient of the pond. Therefore, Roper misled the Corps and both DHEC and the public were denied opportunities to participate regarding water quality by Roper's incorrect and incomplete application.

4. The impacts of this project were considered by DHEC in a piecemeal fashion and instead should have been considered as part of the comprehensive review required by DHEC

Regulation 61-101.

D. The approvals and permit were issued in reliance upon a Nationwide Permit issued by the US Army Corps of Engineers that does not authorize the types of alterations to the pond and wetlands that Roper Pond, LLC, propose to make on this site.

E. The approvals and permit were issued in reliance upon a DHEC 401 Water Quality Certification that was issued without any public notice or opportunity for public comment prior to the issuance of the storm water approvals; the DHEC 401 Water Quality Certification was erroneously issued for a Nationwide Permit under the Clean Water Act Section 404 program administered by the US Army Corps of Engineers that does not authorize the types of alterations to the pond and wetlands that Roper Pond, LLC, propose to make on this site. DHEC failed to make a comprehensive review of the project when it certified the Nationwide Permit approval; the project also violates DHEC water quality certification rules in that:

1. the project would permanently alter the aquatic ecosystem in the vicinity of the project such that its functions and values would be eliminated or impaired, in violation of DHEC Regulation 61-101.F.5.(a) ;

2. there are feasible alternatives to the activity, which would reduce adverse consequences on water quality and classified uses, and therefore the approval of this project violates DHEC Regulation 61-101.F.5(b);

3. the proposed activity adversely impacts special or unique habitats, in violation of DHEC Regulation 61-101.F.5.(d).

E. The project proposes to fill and make significant alterations to a water of the State, and to convert a naturalized water of the State into a storm water retention pond instead of retaining the storm water within upland constructed retention areas; this proposal violates DHEC Regulations 61-9 and 61-68.

F. The project calls for lowering the water level in order to provide storm water retention capacity, but the Department failed to take into account the fact that lowering the water level, which would be accomplished by excavating the bottom level of the pond, will result in the drainage of wetlands associated with the pond, altering the hydrology of those wetlands and causing additional adverse impacts to these wetlands, all in violation of DHEC Regulations 61-9 and 61-101.

G. The issuance of a 401 water quality certification without first providing public notice and opportunity for public comment violated the rights of the Petitioners to due process of law under Article I, Section 22 of the South Carolina Constitution.

H. The approved permit violates Regulation 61-9 in that the plans fail to control the first

flush volumes and thus this project would have significant impacts upon water quality both within the existing pond and downstream portions of the Gills Creek watershed.

I. The approved permit violates Regulation 61-9 in that the Department gave approval to plans that include an arbitrary proposed particle size distribution in the calculations used by the design engineer for post-development storm water runoff.

J. The approved permit violates Regulations 61-9, 61-68, and 61-101 in that it fails to take into account a number of significant water quality problems associated with the high density design of the project proposed for this site.

4. A brief summary of the facts to be presented at the hearing.

Roper Pond, LLC, submitted an application for storm water permits and approvals for the construction of a project known as Roper Pond Apartments. Representatives of Roper Pond, LLC, have stated that they plan to construct a high density apartment complex on a tract of land consisting of approximately 12.75 acres lying immediately adjacent to the Town of Arcadia Lakes.

The project includes the proposal to make a number of alterations to a pond lying on the property. The pond is a part of the Gills Creek watershed and drains into Cary Lake, a lake within the watershed lying within the town limits of the Town of Arcadia Lakes. The proposed alterations include filling of portions of the pond and wetlands at the edges of the pond and the excavation of a substantial portion of the pond to convert the pond from a productive shallow picturesque lily-pad pond into a typical unsightly and unproductive storm water retention basin.

The pond proposed for alterations presently functions as a significant bird habitat and a highly productive wetland providing significant public benefits in filtration of storm waters and improving the quality of waters within the Gills Creek basin.

The Gills Creek basin is currently listed as an impaired waterway under Section 303(d) of the federal Clean Water Act, and significant efforts are being made to improve the waters of the Gills Creek watershed and to remedy the problems that have impaired this watershed. Activities such as filling and excavating functional ponds in this watershed will only add to the water quality problems within the Gills Creek watershed.

The Petitioners believe that this project will violate the laws and regulations set forth above and that the evidence will demonstrate these violations.

5. The action requested of the Court and a detailed statement of the law which supports the requested action, including statutory and/or case citation.

The Petitioners request that the Court reverse the agency decision to issue a permit and

certification to Roper Pond, LLC.

The law which supports reversal is as follows:

- the project proposes to utilize existing waters of the State and wetlands as a component of the stormwater management system for the project, but the necessary state and federal wetlands permits and certifications have not been obtained, in violation of Storm water regulation 72-307.C.(7).

- the project violates the state stormwater management act and regulations and the SC Pollution Control Act and DHEC Regulations 61-68 and 61-9.

- the project violates the DHEC Regulations governing 401 water quality certifications, S.C. Code Ann. Regs. § R.61-9.

6. A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion.

None identified to date.

7. A list of proposed witnesses and exhibits.

Individual petitioners

Petitioners will identify one or more expert witnesses as soon as possible

DHEC personnel involved in the decisions

Exhibits:

Documents from the DHEC administrative record

Maps and photographs of the proposed development site and surrounding areas within the Gills Creek watershed

Plans for the proposed development

Documents submitted by or on behalf of Roper Pond, LLC to the Corps of Engineers

8. A statement regarding the necessity for discovery, if any.

Petitioners are serving Interrogatories, Requests for Production of Documents and

Things, and a Request for Entry Upon the development site. Petitioners anticipate at least 3 depositions. Petitioners request 120 days from the date of this prehearing statement for discovery and trial preparation.

9. Whether the party deems it necessary by the undersigned Judge to conduct a PreHearing Scheduling Conference or issue an order regarding motions, discovery, etc.

Not determined at this time.

10. The estimated time required for the hearing.

One to two days.

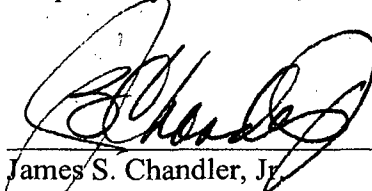
11. A range of proposed hearing dates for which all of the parties are available for a hearing on the merits in this case.

September 1-4, 15-18, 22-25, 29-October 2, October 6-9, 13-16, 2009.

12. An e-mail address that the Court can use for e-mail correspondence.

Jchandler@scelp.org

Respectfully submitted,



James S. Chandler, Jr.

Amy E. Armstrong

SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

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Pawleys Island, SC 29585

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Attorneys for the Petitioners

Georgetown, South Carolina

April 6, 2009

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda)
Z. Jackson, Robert E. Williams, Jr., Barbara S.)
Williams, Elizabeth M. Walker, Louis E. Spradlin,)
Mary Helen Spradlin, Thomas Hutto Utsey, Tony)
Sinclair, Aaron Small, Bette Small, Gene F. Starr,)
M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L.)
Marcus, and Steven Brown,)

Petitioners,)

vs.)

South Carolina Department of Health and)
Environmental Control, and Roper Pond, LLC,)

Respondents.)

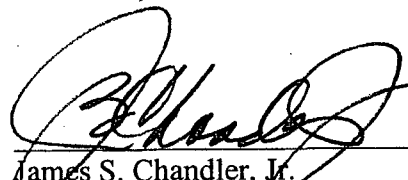
Docket No. 09-ALC-07-0069-CC

CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the Prehearing Statement in this matter upon counsel for the Respondents by placing same in the United States Mail, First Class Postage Prepaid, addressed to:

W. Thomas Lavender, Esquire
Nexsen Pruet
Post Office Drawer 2426
Columbia, SC 29202

Stephen P. Hightower, Esquire
DHEC Office of Counsel
2600 Bull Street
Columbia, SC 29201



James S. Chandler, Jr.
Attorney for the Appellants

Georgetown, South Carolina

April 7, 2009

COPY

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Town of Arcadia Lakes, Robert L. Jackson, Linda)
Z. Jackson, Robert E. Williams, Jr., Barbara S.)
Williams, Elizabeth M. Walker, Louis E. Spradlin,)
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Environmental Control and Roper Pond, LLC,)

Respondents.)

Docket No. 09-ALC-07-0069-CC

AMENDED
PREHEARING STATEMENT
OF
PETITIONERS

FILED

JUN 18 2009

SC ADMIN. LAW COURT

The Petitioners submit the following as their Prehearing Statement:

1. The nature of this proceeding.

This proceeding is a contested case appeal of the decision of the South Carolina Department of Health and Environmental Control ("DHEC") to issue a storm water permit (including a Stormwater Pollution Prevention Plan and the granting of coverage under the NPDES Permit for Storm Water Discharges from Large and Small Construction Activities SCR100000) to Roper Pond, LLC, for the proposed construction of a project known as Roper Pond Apartments, a high density apartment complex, on a tract of land consisting of approximately 12.75 acres lying immediately adjacent to the Town of Arcadia Lakes.

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B. Whether Roper Pond, LLC's Stormwater Pollution Prevention Plan (SWPPP) is deficient and DHEC should not have issued a Construction NPDES Permit for this site because:

1. There are significant defects in the construction and post construction portions of Roper's SWPPP. The silt fence shown on drawing C2 is placed inside the Wetlands Buffer, too close to the wetlands, and in some areas through the wetlands. The Wetlands Buffer area must remain undisturbed to be effective.

2. The September 2, 2008 Richland County conditional approval states that the maximum driveway width be 24 feet. The Roper drawing C4 shows a 26 foot width. This adds significant impervious area which would cause additional stormwater runoff and additional pollutants. The County conditional approval requires "Preservation of trees in the green area next to the pond." Based on the existing condition shown on drawing C1 and the Site Planting Plan, it appears that no trees are being preserved in the green area around the pond. Grubbing existing trees in the area around the pond defeats the usefulness of a Wetlands Buffer and will cause sediment to enter the pond.

3. Roper Pond, LLC's documents note that zinc is a problem in Cary Lake, but incorrectly states that no zinc will come from its development. It is well documented that zinc is discharged from roof drains of large buildings and from large parking lot areas.

4. DHEC is not authorized to issue an NPDES Construction Permit where such construction or post construction condition would "cause or contribute" to impairment of the receiving water body, unless, the MS4 is in compliance with its Stormwater Management Plan (SWMP). On its website, Richland County states, "Q. Why is Richland County proposing new stormwater regulations, to include buffers? A. Because Richland County is in violation of the clean water act and has been cited by DHEC...And as a result of this violation, we have agreed to change our regulations to address the cited deficiencies. These changes would help Richland County improve the water quality in our community for our residents." Therefore DHEC cannot issue a new construction permit until the County adopts and applies the improved ordinance.

5. Roper Pond, LLC's calculated trapping efficiency for the post construction water quality devices (i.e., Best Management Practices (BMPs)) is flawed. First, the calculations do not properly and adequately address capture of the "first flush" stormwater runoff volume that would come from the site; and thus, the devices are not of adequate size to capture what is

documented to be the most significant portion of a runoff event for transporting pollutants to the receiving water. Second, Roper Pond, LLC, assumes an even distribution of particles, 20% for each of the five particle sizes. This assumed particle distribution is incorrect and yields an inaccurate and incorrect particle trapping efficiency for these BMPs. Also, no oil and grease trapping efficiency was calculated. Leaking vehicle crankcase and transmission oils in parking lots would contain and transport zinc if not properly captured. DHEC should not have approved the Construction NPDES Permit because of these significant deficiencies.

C. Whether Roper Pond, LLC, submitted materially incorrect information and omitted material information in its submissions to Richland County, DHEC, and the Corps, and violated DHEC Regulation 72-307.C.(7) by failing to obtain all necessary federal and state permits to allow existing wetlands to be a component of an overall stormwater management system, in that neither DHEC nor the Corps has approved Roper Pond, LLC's plan to excavate the vegetated wetlands/pond for storm water detention.

D. The project proposes to fill and make significant alterations to a water of the State, and to convert a naturalized water of the State into a storm water retention pond instead of retaining the storm water within upland constructed retention areas; this proposal violates DHEC Regulations 61-9 and 61-68.

E. The project calls for lowering the water level in order to provide storm water retention capacity, but the Department failed to take into account the fact that lowering the water level, which would be accomplished by excavating the bottom level of the pond, will result in the destruction of vegetated wetlands, drainage of wetlands associated with the pond, altering the hydrology of those wetlands and causing additional adverse impacts to these wetlands, all in violation of DHEC Regulations 61-9 and 61-68.

F. The approved permit violates Regulation 61-9 in that the plans fail to control the first flush volumes and thus this project would have significant impacts upon water quality both within the existing pond and downstream portions of the Gills Creek watershed.

G. The approved permit violates Regulation 61-9 in that the Department gave approval to plans that include an arbitrary proposed particle size distribution in the calculations used by the design engineer for post-development storm water runoff.

H. The approved permit violates Regulations 61-9, 61-68, and 61-101 in that it fails to take into account a number of significant water quality problems associated with the high density design of the project proposed for this site; fails to address the wetlands and the chemical, biological and other harms to the waters of the state; will result in multiple violations of state water quality standards by destroying a balanced indigenous aquatic community of flora and fauna; and will violate the anti-degradation clause of the water quality regulations.

4. A brief summary of the facts to be presented at the hearing.

Roper Pond, LLC, submitted an application for storm water permits and approvals for the construction of a project known as Roper Pond Apartments. Representatives of Roper Pond, LLC, have stated that they plan to construct a high density apartment complex on a tract of land consisting of approximately 12.75 acres lying immediately adjacent to the Town of Arcadia Lakes.

The project includes the proposal to make a number of alterations to a pond lying on the property. The pond is a part of the Gills Creek watershed and drains into Cary Lake, a lake within the watershed lying within the town limits of the Town of Arcadia Lakes. The proposed alterations include filling of portions of the pond and wetlands at the edges of the pond and the excavation of a substantial portion of the pond to convert the pond from a productive shallow picturesque lily-pad pond into a typical unsightly and unproductive storm water retention basin.

The pond proposed for alterations presently functions as a significant bird habitat and a highly productive wetland providing significant public benefits in filtration of storm waters and improving the quality of waters within the Gills Creek basin.

The Gills Creek basin is currently listed as an impaired waterway under Section 303(d) of the federal Clean Water Act, and significant efforts are being made to improve the waters of the Gills Creek watershed and to remedy the problems that have impaired this watershed. Activities such as filling and excavating functional ponds in this watershed will only add to the water quality problems within the Gills Creek watershed.

The Petitioners believe that this project will violate the laws and regulations set forth above and that the evidence will demonstrate these violations.

5. The action requested of the Court and a detailed statement of the law which supports the requested action, including statutory and/or case citation.

The Petitioners request that the Court reverse the agency decision to issue a permit and certification to Roper Pond, LLC.

The law which supports reversal is as follows:

- the project proposes to utilize existing waters of the State and wetlands as a component of the stormwater management system for the project, but the necessary state and federal wetlands permits and certifications have not been obtained, in violation of Storm water regulation 72-307.C.(7).

- the project violates the state stormwater management act and regulations and the SC Pollution Control Act and DHEC Regulations 61-68 and 61-9.

6. A summary of any motions expected to be raised at the hearing and the appropriate authority underlying the motion.

None identified to date.

7. A list of proposed witnesses and exhibits.

Individual petitioners

Seth Reice, Ph.D.

DHEC personnel involved in the decisions

Exhibits:

Documents from the DHEC administrative record

Maps and photographs of the proposed development site and surrounding areas within the Gills Creek watershed

Plans for the proposed development

Documents submitted by or on behalf of Roper Pond, LLC to the Corps of Engineers

Transcripts of the Rule 30b6 deposition of DHEC (Chuck Hightower and Jill Stewart)

Reports prepared by Dr. Seth Reice

8. A statement regarding the necessity for discovery, if any.

Petitioners are serving Interrogatories, Requests for Production of Documents and Things, and a Request for Entry Upon the development site. Petitioners anticipate at least 3 depositions. Petitioners request 120 days from the date of this prehearing statement for discovery and trial preparation.

9. Whether the party deems it necessary by the undersigned Judge to conduct a PreHearing Scheduling Conference or issue an order regarding motions, discovery, etc.

None except those motions already heard and decided.

10. The estimated time required for the hearing.

One to two days.

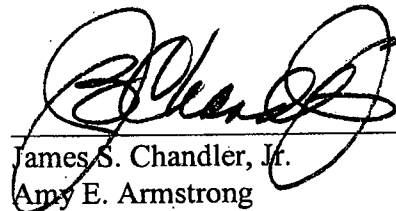
11. A range of proposed hearing dates for which all of the parties are available for a hearing on the merits in this case.

Trial is set for September 3-4, 2009.

12. An e-mail address that the Court can use for e-mail correspondence.

Jchandler@scelp.org

Respectfully submitted,



James S. Chandler, Jr.

Amy E. Armstrong

SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

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Attorneys for the Petitioners

Georgetown, South Carolina

June 16, 2009

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Town of Arcadia Lakes, Robert L. Jackson,
Linda Z. Jackson, Robert E. Williams, Barbara
S. Williams, Elizabeth M. Walker, Louis E.
Spradlin, Mary Helen Spradlin, Thomas Hutto
Utsey, Tony Sinclair, Aaron Small, Bette
Small, Gene F. Starr, M.D., Elaine J. Starr,
Sanford T. Marcus, Ruth L. Marcus, and
Steven Brown,

Petitioners,

vs.

South Carolina Department of Health and
Environmental Control and Roper Pond, LLC,

Respondents.

Docket No. 09-ALC-07-0069-CC

**RESPONDENT ROPER POND, LLC'S
PETITION FOR ATTORNEYS' FEES
AND COSTS AND FOR SANCTIONS
PURSUANT TO RULE 72, SCRPALC**

Pursuant to S.C. CODE ANN. § 15-77-300, Respondent Roper Pond, LLC's ("Roper Pond") hereby moves this Court for an order directing the Petitioner Town of Arcadia Lakes ("Town") to pay to Roper Pond its attorneys' fees and costs incurred in this matter in the amount of \$130,822. In the alternative, Roper Pond moves the Court for an order awarding Roper Pond \$641,252 for attorneys' fees and costs and the costs associated with delay of the planned development of the Roper Pond property on Trenholm Road in Richland County ("Property") as sanctions pursuant to Rule 72 of the South Carolina Rules of Procedure for the Administrative Law Court.

The grounds for this petitioner for fees and costs pursuant to S.C. CODE ANN. § 15-77-300 are:

1. Roper Pond is a prevailing party in this matter as the Court's Final Order and Decision filed January 21, 2010, and the denial of Petitioners' Motion to Reconsider on March

FILED

APR 19 2010

0244

SC ADMIN. LAW COURT

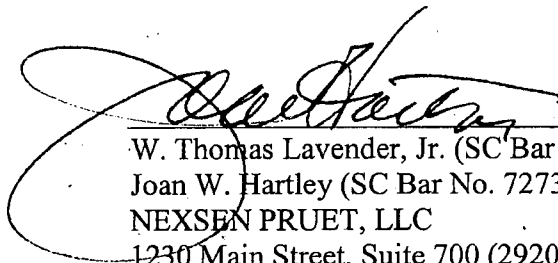
23, 2010, upheld the decision of Respondent South Carolina Department of Health and Environmental Control ("DHEC") to grant Roper Pond coverage under Permit No. SCR100000, NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities ("Construction General Permit");

2. The Town acted without substantial justification in bringing this action challenging DHEC's decision to grant coverage to Roper Pond under the Construction General Permit, and in fact, lacked standing to bring such action, and;

3. There are no special circumstances that would make an attorneys' fee award unjust.

Additionally, or in the alternative, Roper Pond asks the Court to award attorneys' fees and costs and the costs associated with delay in the planned development of the Property to Roper Pond pursuant to Rule 72, SCRALC, on the grounds that Petitioners' challenge to the DHEC's decision to grant coverage to Roper Pond under the General Permit was frivolous and/or taken solely for the purpose of delay.

This petition is supported by the applicable law, the pleadings, motions, and memoranda on file in this case, the discovery conducted in this case, the testimony and evidence presented at the hearing on the merits, affidavits filed and served herewith, and the memorandum of law filed in support of this petition.



W. Thomas Lavender, Jr. (SC Bar No. 3143)

Joan W. Hartley (SC Bar No. 72735)

NEXSEN PRUET, LLC

1230 Main Street, Suite 700 (29201)

Post Office Drawer 2426

Columbia, South Carolina 29202

803.771.8900

Attorneys for Respondent

Roper Pond, LLC

April 19, 2010
Columbia, South Carolina

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW JUDGE DIVISION**

Town of Arcadia Lakes, Robert L. Jackson,
Linda Z. Jackson, Robert E. Williams, Barbara
S. Williams, Elizabeth M. Walker, Louis E.
Spradlin, Mary Helen Spradlin, Thomas Hutto
Utsey, Tony Sinclair, Aaron Small, Bette
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Docket No. 09-ALC-07-0069-CC

**MEMORANDUM OF LAW IN
SUPPORT OF RESPONDENT ROPER
POND, LLC'S PETITION FOR
ATTORNEYS' FEES AND COSTS AND
FOR SANCTIONS PURSUANT TO
RULE 72, SCRPA LC**

Respondent Roper Pond, LLC ("Roper Pond") respectfully submits this memorandum of law in support of its Petition for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPA LC ("Petition for Attorneys' Fees"), filed simultaneously herewith.

I. PROCEDURAL HISTORY

By letter dated December 15, 2008, the Department granted Roper Pond coverage under the 2006 NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities ("Construction General Permit"), authorizing land-disturbing activities on 9.6 acres in association with construction of a multi-family residential housing development to be located off Trenholm Road in Richland County ("Proposed Project") pursuant to the Construction General Permit. On December 30, 2009, Petitioners Town of Arcadia Lakes ("Town"), Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette

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Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown² (collectively, the "Petitioners") requested South Carolina Board of Health and Environmental Control ("Board") review of the issuance of the authorization to discharge under the Construction General Permit. By letter dated January 14, 2009, the Clerk of the Board notified Petitioners that the Board had decided not to conduct a review conference as requested. On February 16, 2009, Petitioners filed a Request for Contested Case Hearing, asserting the numerous grounds for its appeal of the Department's decision in this matter. (See Request for Contested Case Hearing, pp. 3-8). However, at the hearing on the merits, Petitioners' case in chief focused almost exclusively on the excavation and lowering of the Pond on the property and allegations that Roper Pond did not secure a required federal permit to conduct such activities. On January 21, 2010, the Court issued an order upholding the Department's decision to authorize coverage under the Construction General Permit and rejecting Petitioners' arguments that a Corps permit and individual 401 water quality certification was required for the excavation of the Pond. On February 1, 2010, Petitioners filed a Motion to Reconsider and for Stay. On March 23, 2010, the Court held a hearing to consider Petitioners' Motion to Reconsider and for Stay, and on April 1, 2010, the Court issued an order denying Petitioners' Motion to Reconsider and for Stay.

II. ARGUMENT AND CITATION OF AUTHORITY

As discussed more fully below, Roper Pond is entitled to an award of attorneys' fees and costs pursuant to S.C. CODE ANN. § 15-77-300 *et seq.* ("State Action Statute") because Roper Pond is a prevailing party in this matter, the Town pursued its challenge to the Department's decision without substantial justification, and there are no special circumstances precluding an award of attorneys' fees in this matter. Additionally, or in the alternative, Roper Pond should be

awarded attorneys' fees and costs and the costs of delay of the Proposed Project pursuant to Rule 72 of the South Carolina Rules of Procedure for the Administrative Law Court.

A. Roper Pond is entitled to an award of attorneys' fees and costs from the Town under the State Action Statute.

Roper Pond is entitled to attorneys' fees and costs in this matter pursuant to Section 15-77-300 of the State Action Statute because the Town acted without substantial justification in challenging the Department's decision to grant Roper Pond coverage under the Construction General Permit for the Proposed Project and there are no special circumstances making an award of attorneys' fees in this matter unjust. Section 15-77-300 of the State Action Statute provides in relevant part as follows:

(A) In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:

(1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and

(2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

* * *

(C) The provisions of this section do not apply to civil actions relating to the establishment of public utility rates, disciplinary actions by state licensing boards, habeas corpus or post conviction relief actions, child support actions, except as otherwise provided for herein, and child abuse and neglect actions.

S.C. CODE ANN. § 15-77-300(A) (2005) (as amended by 2010 S.C. Act No. 125). It is indisputable that the Town is a political subdivision of the State. Additionally, attorneys' fees and costs incurred in an action originating in the Administrative Law Court are subject to an award under S.C. CODE ANN. § 15-77-300. *See Video Gaming Consultants, Inc. v. South*

Carolina Dep't of Revenue, 358 S.C. 647, 651-52, 595 S.E.2d 890, 892 (Ct. App. 2004) (reviewing an award of attorneys' fees pursuant to S.C. CODE ANN. § 15-77-300 for fees associated with appeal originating in the Administrative Law Court upon a finding the Department of Revenue acted with substantial justification). Indeed, Section 15-77-300(C) of the State Action Statute expressly excludes other actions which are within the jurisdiction of the Administrative Law Court. *See* S.C. CODE ANN. § 40-1-160 (2001) (providing that an appeal from the decision of a state licensing board is filed in the Administrative Law Court); *Al-Shabazz v. State*, 338 S.C. 354, 369, 527 S.E.2d 742, 750 (2000) (holding that an inmate may seek post-conviction relief under the provisions for contested cases contained in the Administrative Procedures Act); S.C. CODE ANN. § 1-23-310(3) (Supp. 2009) (defining contested case as "a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing"). "The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded." *Stewart v. Richland Memorial Hosp.*, 350 S.C. 589, 594, 567 S.E.2d 510, 513 (Ct. App. 2002) (citation omitted). As such, there is no question that an action brought by the Town before the Administration Law Court is subject to the State Action Statute.

In order to recover under the State Action Statute, a party must establish that: "first, the contesting party must be the 'prevailing party;' second, the court must find 'that the agency acted without substantial justification in pressing its claim against the party;' and third, the court must find 'that there are no special circumstances that would make an award of attorney's fees unjust.'" *Heath v. County of Aiken*, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990) (quoting *Heath v. Aiken County*, 295 S.C. 416, 420, 368 S.E.2d 904, 906 (1988)). As discussed more fully

below, Roper Pond is unquestionably entitled to an award of attorneys' fees and costs pursuant to the State Action Statute because Roper Pond is the prevailing party in this matter, the Town pursued its challenge to the Department's decision in this matter without substantial justification, and there are no special circumstances precluding an award of attorneys' fees and costs in this matter.

B. Roper Pond is a "prevailing party" in this matter.

On January 21, 2010, this Court issued an order affirming the Department's grant of coverage the Roper Pond under the Construction General Permit. "The key factor in determining whether a party is a prevailing party is the degree of success obtained by the party seeking attorney's fees." *Douan v. Charleston County Council*, 631 S.E.2d 544, 546 (Ct. App. 2006). The South Carolina Supreme Court has held that "a party need not be successful as to all issues in order to be found to be a prevailing party" under the State Action Statute. *Heath v. County of Aiken*, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990). In *Heath*, the Court defined "prevailing party" as "[t]he one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered." *Id.* at 182-83, 394 S.E.2d at 711 (quoting *Buza v. Columbia Lumber Co.*, 395 P.2d 511, 514 (1964)). There is no dispute that Roper Pond is a prevailing party in this action. Not only did the Respondents prevail on the main issue in the matter, they prevailed on all issues before this Court. The Final Order and Decision found that Petitioners, including the Town, lacked standing in this matter; however, the Court also considered the merits of the issues raised by Petitioners and affirmed the Department's decision to grant Roper Pond coverage under the Construction General Permit.

Upon the denial of the Motion to Reconsider, Roper Pond is unquestionably a prevailing party in this matter.

C. The Town acted without substantial justification in challenging the Department's grant of coverage to Roper Pond under the Construction General Permit.

The Town's challenge to the Department's decision in this matter was without substantial justification as the Town failed to identify any reasonable statutory or regulatory basis for its claims that the Department improperly granted coverage to Roper Pond under the Construction General Permit. "An agency action supported by substantial justification is one which has a reasonable basis in law and fact." *McDowell v. South Carolina Dep't of Soc. Servs.*, 304 S.C. 539, 542, 405 S.E.2d 830, 832 (1991) (citing *Pierce v. Underwood*, 487 U.S. 552 (1988)). In *Heath v. County of Aiken*, the South Carolina Supreme Court held that "substantial justification," for the purposes of S.C. CODE ANN. § 15-77-300, means "justified to a degree that could satisfy a reasonable person." 302 S.C. at 183, 394 S.E.2d at 712. However, "a court need not go so far as to brand a claim 'frivolous' in order for it to be found to be without substantial justification." *Id.* (citing *Pierce v. Underwood*, 108 S. Ct. at 2251). In *Heath*, the Court held that the county council acted without substantial justification because "[t]he statute construed in [the case] was unambiguous, and coupled with the relevant precedent clearly established that the Council's claims were without merit." *Id.* at 184, 394 S.E.2d at 712. The holding in *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008), further clarifies "substantial justification" for the purposes of S.C. CODE ANN. § 15-77-300:

Substantial justification for purposes of the state action statute means "justified to a degree that could satisfy a reasonable person." *Heath v. County of Aiken*, 302 S.C. 178, 183, 394 S.E.2d 709, 712 (1990) (quoting *Pierce v. Underwood*, 487 U.S. 552, 564, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988)). Therefore, in deciding whether a state agency acted with substantial justification, the relevant question is whether the agency's position in litigating the case had a reasonable basis in law

and in fact. *McDowell v. S.C. Dept. of Soc. Servs.*, 304 S.C. 539, 542, 405 S.E.2d 830, 832 (1991). Although an agency's loss on the merits does not create a presumption that its position was not substantially justified, *Video Gaming Consultants, Inc. v. S.C. Dept. of Revenue*, 358 S.C. 647, 650, 595 S.E.2d 890, 892 (Ct. App. 2004), **the substance and outcome of the matter litigated is nevertheless relevant to the determination of whether there was substantial justification in pressing a claim.** *Heath*, 302 S.C. at 183, 394 S.E.2d at 712.

Layman v. State, 376 S.C. 434, 445, 658 S.E.2d 320, 325-26 (2008) (emphasis added). As discussed below, there is no question that the Town acted without substantial justification in challenging the Department's grant of coverage to Roper Pond under the Construction General Permit. Not only did the Town fail to identify any reasonable basis in state or federal law for its claims, but the record clearly shows that the Town pursued its claims in this Court for the sole purpose of delaying the planned development of the Property.

1. The Town identified no reasonable basis in law or in fact for its challenge to the Department's grant of coverage to Roper Pond under the Construction General Permit.

In the Request for Contested Case Hearing and Petitioners' Pre-Hearing Statement, Petitioners cited a number of state and federal statutes and regulations which the Department's decision in this matter allegedly violated. However, at the hearing on the merits, Petitioners failed to offer evidence in support of any legitimate claim with a reasonable basis in law and in fact. As a preliminary matter, the Department's decision which was challenged in this matter was the grant of coverage to Roper Pond under the Construction General Permit. The Department's decision was based on its review and approval of the Storm Water Pollution Prevention Plan ("SWPPP") prepared for the Proposed Project. Yet, at the hearing on the merits, Petitioners offered absolutely no evidence that the SWPPP approved by the Department was technically deficient. Indeed, since the nature of such deficiencies would involve technical or specialized knowledge outside of the common knowledge and experience of a trier of fact, it would be

expected that Petitioners would have offered an expert to assist the Court in assessing any alleged deficiencies. Rule 702, SCRE. Yet, no expert testimony was offered for this purpose. Indeed, Petitioners' only expert witness offered in this matter testified that he had not reviewed the SWPPP prepared on behalf of Roper Pond. (Tr. p. 201, l. 12 – p. 202, l. 7). Moreover, Petitioners' expert testified that he has no prior experience in assessing the potential impacts of excavation of a water body. (Tr. p. 190, l. 24 – 191, l. 6). Petitioners' case in chief was focused almost exclusively on the dredging of the Pond; yet, Petitioners' expert at trial admitted at trial that he was not qualified to opine on this matter. In fact, while Petitioners' expert initially opined that the proposed excavation of the pond "will simply destroy the ecosystem that is now present," he later withdrew that opinion because, as he stated, "I was trying to restrict myself to what I actually knew as opposed to my conjectures." (Roper Pond Ex. 12; Tr. p. 200, ll. 3-19).

Additionally, and significantly, at the heart of Petitioners' claims was the contention that Roper Pond did not have the required federal permit to excavate the pond on the property. However, the federal law is clear and well-settled that a federal permit is required for excavation of a water body only when such activity is to be conducted in a "navigable water of the United States" under Section 10 of the Federal Rivers and Harbors Act, 33 U.S.C. §§ 401 *et seq.* ("Rivers and Harbors Act"). 33 U.S.C. § 403. This Court correctly held that "Petitioners neither claimed nor presented any evidence that the Pond is a navigable water of the United States under Section 10 of the Rivers and Harbors Act." (Final Order and Decision, p. 27). Moreover, Petitioners failed to identify any other federal or state law which required a permit for excavation of the Pond. Instead, Petitioners merely claimed that a federal permit for excavation of the Pond, which was unquestionably not required under federal law, was nonetheless required as a condition of the 401 water quality certification for the Nationwide Permits or by a general

reference to federal permits in the Construction General Permit. While these claims might be characterized as novel, such characterization does not preclude a finding that the Town acted without substantial justification. The fact that a political subdivision of the State has raised novel issues in an action does not mean that the political subdivision was substantially justified in bringing such action. *Cornelius v. Oconee County*, 369 S.C. 531, 539-40, 633 S.E.2d 492, 497 (2006) (finding that citizen who initiated declaratory judgment action against a county was entitled to attorneys' fees because the fact that novel issues were raised does not mean the county was substantially justified in opposing the citizen in the declaratory judgment action). Accordingly, while Petitioners have repeatedly attempted to demonstrate that a federal permit was required for the excavation of the Pond through some inventive, yet untenable, theories of law, such theories are insufficient to demonstrate that the Town acted with substantial justification in pressing these claims.

The weakness of the Town's case and the lack of substantial justification for bringing this action are evident in Petitioners' Motion to Reconsider. It would be fair to presume that Petitioners would raise their strongest argument in a motion for reconsideration. Yet, in its Motion to Reconsider, Petitioners' only argument directed at the Court's ruling on the merits of the case was the argument that the Court erred in failing to find that the Department was required to consider the impact of the overall project as a condition of the 401 water quality certification for Nationwide Permit 29. As discussed at length in Roper Pond's Response to Petitioners' Motion to Reconsider and for Stay, Petitioners' theory is based on an obvious misinterpretation of a general condition to the 401 water quality certification determination for all of the Nationwide Permits. Specifically, in their Proposed Order, Petitioners included a proposed conclusion of law:

DHEC's General Conditions require DHEC to evaluate the complete project – “the overall project proposed or accomplished by a single owner/developer” – and “it is not interpreted to mean only the land area directly impacted by each NWP request.” DHEC must evaluate all land within the project area that is directly impacted by the project – impacts caused by filling wetlands and other direct impacts. In this case, DHEC failed to evaluate the direct impacts of excavation of the lily pad pond in violation of the NPDES General Permit Conditions.

(Petitioners' Proposed Order, Conclusion of Law 12). The general condition of the 401 Water Quality Certification for the Nationwide Permits to which Petitioners refer in their Proposed Order provides in full as follows:

1. SCDHEC considers a “single and complete project” to mean the overall project proposed or accomplished by a single owner/developer and it includes all land within the project boundary under single ownership. It is not interpreted to mean only the land area directly impacted by each NWP request. Impacts to Geographical Areas of Particular Concern (GAPC) sites or adjacent waterbodies or wetlands resulting from an activity will be considered during the review of these actions.¹

(Pet. Ex. 12). As discussed more fully in Roper Pond's Response to Petitioners' Motion to Reconsider and for Stay, it is clear that this condition refers to a “single and complete project” as defined by Section 330.2 of the U.S. Corps of Engineers Regulations (“Corp Regulations”). 33 C.F.R. § 330.2(i). Section 330.6 of the Corps Regulations prohibits the use of the same Nationwide Permit “more than once for a single and complete project.” 33 C.F.R. § 330.6(c).² Moreover, the interpretation which Petitioners urge is clearly contrary to the plain language of the condition of the 401 water quality certification. Again, while the Town may argue that this is a novel issue, such argument does not support a showing that the Town acted with substantial

¹ S.C. CODE ANN. REGS. 30-1(D)(24) defines “Geographic Areas of Particular Concern” as “areas within South Carolina's coastal zone which have been identified in the State's Coastal Management Program as being of such importance as to merit special consideration during the Department review of permit applications.” Accordingly, the final sentence of this general condition is inapplicable to the Proposed Project.

² 33 C.F.R. § 330.6(c) provides as follows: “Multiple use of nationwide permits. Two or more different NWPs can be combined to authorize a “single and complete project” as defined at 33 CFR 330.2(i). However, the same NWP cannot be used more than once for a single and complete project.”

justification in bringing this action. There is simply no reasonable basis in law or fact for this argument. Indeed, the fact that Petitioners identified this particular argument to be raised in its Motion to Reconsider further demonstrates that the Town acted without substantial justification in challenging the Department's decision in this matter.

Additionally, as discussed more fully in Roper Pond's Response to Petitioners' Motion to Reconsider and for Stay, Petitioners' claim regarding the filling of wetlands under a Nationwide Permit is merely an effort to circumvent the federal appeal process, or lack thereof, by challenging the validity of an unappealable Corps decision in an action which purports to challenge a State decision regarding coverage under a State permit. The Corps is the issuing authority for the Nationwide Permits, including Nationwide Permit No. 29 ("NWP 29"), issued pursuant to Section 404 of the Federal Water Pollution Control Act, 33 U.S.C.A. §§ 1251 *et seq.* ("Clean Water Act"). 33 U.S.C.A. § 1344. The Construction General Permit under which the Department granted Roper Pond coverage for the Proposed Project is a permit issued by the Department pursuant to a delegation from the EPA pursuant to Section 402 of the Clean Water Act. 33 U.S.C.A. § 1342(b). Petitioners claim that the coverage under the State Construction General Permit, a Section 402 permit, was improperly granted because the filling of wetlands associated with the project does not conform to the general conditions for the 401 water quality certification for the NWP 29, a Section 404 permit. The Corps is the governmental entity with authority to issue permits for the filling of wetlands under Section 404 of the Clean Water Act. Unquestionably, a determination regarding authorization to conduct activities under a 404 permit, including NWP 29, is within the purview of the Corps—not the Department. In this case, the Corps verified that the fill of 0.075 acres in association with the Proposed Project was authorized under NWP 29. (Roper Pond Ex. 1). However, an appeal of the Corps' verification is not

allowed under the Corps Regulations. Specifically, the Corps Regulations define an “appealable action” as “an approved [jurisdictional determination], a permit denial, or a declined permit, as these terms are defined in this section.” 33 C.F.R. § 331.2. There is no provision for appeal of the Corps’ verification of a pre-construction notice (“PCN”) to conduct activities under a Nationwide Permit. Since the Corps, the permitting entity for the program, does not provide for appeal of authorization to conduct activities under a NWP, Petitioners cannot circumvent the Corps appeal process and raise this unappealable decision in an action contesting a State decision on a permit issued by the State. Again, such claim may be characterized as novel, but it is clearly contrary to well-established law and further demonstrates that the Town acted without substantial justification in challenging the Department’s decision in this matter.

Similarly, Petitioners claimed that the Department improperly granted coverage under the Construction General Permit because the Proposed Project violates the State water quality standards set forth in S.C. CODE ANN. REG. § 61-68 (“Regulation 61-68”). As the Court noted in its Final Order and Decision, the South Carolina Supreme Court directly addressed this claim in *Responsible Economic Development v. South Carolina Department of Health and Environmental Control* and held that the anti-degradation provisions of Regulation 61-68 were not applicable to a stormwater permit issued pursuant to S.C. CODE ANN. §§ 72-300 *et seq.* (Final Order and Decision, p. 28) (citing *Responsible Economic Development v. South Carolina Dep’t of Health and Env’tl. Control*, 371 S.C. 547, 641 S.E.2d 425 (2007)). Yet, despite this unequivocal statement of law by the South Carolina Supreme Court, Petitioners’ case in chief at the hearing was primarily focused on its claim that the Department was required to assess potential water quality impacts resulting from the Proposed Project. Indeed, the only expert testimony that Petitioners offered was testimony regarding the potential impacts of excavating of the Pond.

Similarly, Petitioners' proposed order primarily addresses alleged violations regarding the Department's failure to assess impacts to water quality, including three proposed conclusions that such failure violated Regulation 61-68. (See Petitioners' Proposed Order, Conclusions of Law Nos. 18, 19, and 20). However, as the Court correctly held, there was no legal basis under Regulation 61-68 or another state or federal law supporting this claim.

Despite the wealth of case law interpreting the Clean Water Act, the Rivers and Harbors Act, and the permitting programs established under those Acts, the Town continued to press its claim that a federal permit was required for the excavation of the Pond. In fact, in its Proposed Order, Petitioners included a conclusion of law that a Section 404 permit was required to excavate that Pond. (Petitioners' Proposed Order, Conclusion of Law No. 5). As the Court fully addressed in its Final Order and Decision, a 404 permit is required to filling of wetlands, not dredging. The only evidence on the record shows that during excavation of the Pond, the dredged material will be placed in an area upland of the Pond. Petitioners offered no evidence to dispute this evidence. Accordingly, there is no basis for a claim that a Section 404 permit would be required for excavation of the Pond. Again, while the legal theories advanced by the Petitioners might be characterized as novel at best, those theories have no reasonable basis in law or fact. Indeed, Petitioners' legal theories are completely at odds with a well-settled and substantial body of law. There is simply no reasonable basis in law or in fact for the issues raised by the Town in this matter.

2. The evidence on the record demonstrates that the Town brought this action for the sole purpose of delaying the Proposed Project.

As the record clearly shows, Town's primary objective in appealing the Department's decision in this matter was not to challenge the Department's decision to grant Roper Pond coverage under the Construction General Permit, but to stop or delay the construction of an

apartment complex on the Roper Pond property. On July 29, 2009, Roper Pond noticed the deposition of the Town pursuant to Rule 30(b)(6), SCRCF. The notice of deposition included the following matters on which the Town was to designate an individual to testify:

2. Actual or threatened harm from the activities authorized under the 2006 NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities ("General Permit") for land-disturbing activities on 9.6 acres in association with construction of a multi-family residential housing development to be located off Trenholm Road in Richland County ("Proposed Project").

* * *

4. The specific manner in which the land-disturbing activities authorized under the General Permit will violate the terms and conditions of the General Permit and/or DHEC Regulations.

(Pet. Tr. Ex. 1, Transcript of the Deposition of Richard W. Thomas, Jr., hereinafter "Thomas Dep.," Notice of Rule 30(b)(6) Deposition of the Town of Arcadia Lakes, attached thereto as Ex.

1). The Town designated the Mayor of the Town, Mr. Richard Thomas, as its sole witness for the Rule 30(b)(6) deposition of the Town. Mr. Thomas holds a masters degree in engineering with a focus on structures of mechanics and environmental engineering. (Thomas Dep., p. 14, ll. 4-10). As an engineer licensed by the State, Mr. Thomas has affixed his seal to drawings which include the design of water retention structures. (Thomas Dep., p. 16, l. 15 - p. 19, l. 10). Mr. Thomas is aware of the requirements for the management of stormwater at an improved site. (Thomas Dep., p. 24, ll. 16-22). Mr. Thomas testified that he has seen the design drawings for the Proposed Project. (Thomas Dep., p. 22, l. 19 - 23, l. 11; p. 25, ll. 17-23). Indeed, Mr. Thomas testified that he would be competent to prepare and seal such drawings:

Q: Would you hold yourself out as competent to prepare, and present, and seal drawings similar to what BP Barber has presented to DHEC in this case?

A: If I had the time to study and develop said drawings, I would be capable of doing that.

(Thomas Dep., p. 32, ll. 11-16). However, Mr. Thomas was unable to testify regarding the topics identified by Roper Pond in its notice of deposition to the Town.

When counsel for Roper Pond asked Mr. Thomas to identify any alleged deficiencies in the SWPPP approved by the Department for the Proposed Project, Mr. Thomas responded that any deficiencies were identified by its attorney in the pleadings in this matter:

Q: All right. Let's talk about that. Tell me—well, let me back up. The current plan.

Tell me what in the current plan you think presents a possibility or probability of harm to Cary Lake.

A: I outlined those before. It will possibly do harm to the water flowing through the project and under North Trenholm Road into Cary Lake.

Q: What is the deficiency in the BP Barber drawings that may lead to the possibility?

A: They're outlined in our petition.

Q: Point them out to me.

A: You want me to read you the document?

Q: No, sir. I want to know what the town's —

A: I'll defer that to Mr. Chandler because he's the legal expert.

Q: He is not my witness, Mr. Thomas. You are my witness and you are the town.

Tell me what facts the town has as we sit here today that allows you to opine that there's a possibility of harm if the BP Barber plan is implemented.

A: Based on what we have been told and led to believe by Mr. Chandler, who is the expert in the legal side of this, there are violations in this plan with regard to the project. The plans and its permitting with DHEC and the U.S. Corp of Engineers.

Q: I want you to step aside and put aside anything Mr. Chandler may have told you. In the absence of Mr. Chandler's comments, is the town aware

of any fact upon which it could base an opinion that there is a deficiency in the BP Barber drawings permitted by DHEC?

A: We have hired Mr. Chandler as our spokesman on the legal issues in this case. We believe the case has merit.

Q: Step aside what Mr. Chandler tells you—if Mr. Chandler becomes a witness, we'll deal with this case differently.

What information does the Town of Arcadia Lakes have that, outside of Mr. Chandler's comments to you, leads you to the conclusion that there are deficiencies in the BP Barber design approved by DHEC?

A: We lean on Mr. Chandler's filings and his documentation as the basis for our—

Q: Is Mr. Chandler's complaint the sole source of facts, for the Town of Arcadia Lakes, for it to present a position that the BP Barber drawings are in some way insufficient?

A: I can repeat. Mr. Chandler's pleadings and his filings speak to the case that the town and the petitioners—not speaking for them, but as far as the town is concerned—where we are in our position on this project.

(Thomas Dep., p. 51, l. 14 – p. 53, l. 22). Mr. Thomas further testified regarding an allegation of a technical deficiency in the SWPPP:

Q: I assume that you are asserting that that's something wrong with the plans?

A: If Mr. Chandler says that's something wrong, then I agree with Mr. Chandler.

Q: What information did Mr. Chandler rely upon to come to that conclusion?

A: You'd have to talk to Mr. Chandler, because I do not know.

Q: Do you know of any witness on behalf of the Town of Arcadia Lakes, outside of Mr. Chandler, who can tell me how that conclusion was arrived at?

A: Not to my knowledge.

(Thomas Dep., p. 60, ll. 2-14). Despite Mr. Thomas's education in environmental engineering, his experience in the design of stormwater retention structures, and his familiarity with the

SWPPP, he was unable to identify a single factual allegation related to the defects in the SWPPP independent of the filings in this matter. However, while Mr. Thomas could not testify regarding the specific facts supporting the allegation that the SWPPP was deficient, Mr. Thomas did testify at great length about the Town's numerous concerns and complaints about the planned development of the Roper Pond property as an apartment complex.

Mr. Thomas testified that there was no opposition to the previous plan to construct condominiums on the Roper Pond property. Specifically, Mr. Thomas testified regarding a request from Roper Pond to annex the property into the Town and the support for the development of the property as condominiums and patio homes:

Q: All right. Arcadia Lakes has its own zoning ordinance administered by its own zoning board?

A: That's correct.

Q: Why did you not suggest that he make an appeal to your zoning board?

A: It was easier—we thought it was easier for them to do it the other way. I don't remember what the context was then.

Q: Were you concerned that the citizens would oppose that kind of zoning?

A: No. As a matter of fact from the condo standpoint, out of the 15 or 20 small zero lot line patio homes, we had as many as 10 that were spoken for by town's people that wanted to retire and no longer do yard work and still be in the town.

Our town is a very close town. We have almost 900 residents and we are a very, very close [k]nit town. People don't want to move out of the town once they move in.

There are a lot of amenities in the town that are very, very good. For instance, there's no taxes. We don't have any town taxes. We deal off of County taxes, revenue sharing, franchise fees, business licenses. Those type of things. We run the town off of a very lean budget.

Q: So you, for whatever reason, suggested that rather than annexing him in and changing your zoning—

A: We couldn't do that. It was my understanding at that time that that was not an option.

Q: For what reason?

A: If we annexed him in, then he would be annexed in as the existing zoning. And he didn't want the existing zoning, which was residential, light commercial. He wanted multifamily.

Q: So to solve that you suggested he get the County to change it, and then you can bring him in, grandfather him in, or bring him in subject to that zoning?

A: Correct.

Q: And you thought that would work?

A: With the plans that he had then, everyone was very much in favor of those. The plans were very high-end condos, low density, a lot of amenities, and fit in with the -- --

Q: Understanding that we're talking hindsight, but the feeling at the time was that if he had gone forward with that project of patio homes to condominiums, it would have been supported by the town and you could have brought it in, annexed it in, subject to the County zoning?

A: --with the plans that were presented to us at that time, we did not have any major problems with those plans at that time that I can recall.

Q: You would have recommended bringing it into the city by annexation?

A: Correct.

Q: And you had citizens in the town who were in favor of it and who actually wanted to live in the patio homes?

A: That's correct.

(Thomas Dep., p. 83, l. 21 – p. 86, l. 10). The opposition to the development began upon learning that the property would be developed as an apartment project. Mr. Thomas testified:

Q: As of October 2nd, was one of your reasons for opposing this project as mayor of the Town of Arcadia lakes, the potential for individual unit owners to have their property values depressed?

A: Yes. That was one of the reasons we wanted an economic study done to determine that.

Q: Is that one of the reasons you wanted to stop this project?

A: That was one of the reasons for our opposition to the project as it was presented.

Q: And do I understand you to say that as it was presented, the primary concern was the additional density over and above what was presented to you in 2004?

A: No. It was also the economic impact. It was also the character of the neighborhood.

Q: Well, you did not oppose the townhouses, patio homes, condominiums, correct? You personally wanted to buy one.

A: True.

Q: What factor, other than the density of the apartments, led you to believe there would be a depression in economic value for certain homeowners in Arcadia Lakes?

A: Safety to you, to the transient nature of the folks renting the property, light intrusion into the actual property adjoined, potential overflow of the sewer system due to the fact—did it actually—was it sized properly to handle an additional 204 units. I mean, the town only has 890 people living in the town. You're adding another 4-500 residents to the system, traffic. All those had—all those come together—all of that has to do with the density.

Q: All of those factors arise out of the increase density, right?

A: That's the way I see it.

(Thomas Dep., p. 112, l. 5 -113, l. 17). There is no doubt that the Town felt that the developers of the Proposed Project had misled the Town to obtain support for the rezoning of the property. For example, in a August 23, 2008 email, Mr. Thomas wrote:

I believe that the town was misled and deceived in the initial meetings 3+ years ago when the same developer came to us for our support and the support of the adjacent neighborhood to rezone and then used the rezoning to restructure his plans for monetary gain. Per conversation with Mr. Carter Ellis, the same was

told to the property owners on the north side of the Roper Property to get their blessing for the rezoning. The town should use all necessary means to go before the Richland County Planning Commission and appeal the August 21 Planning Committee recommendation (on numerous reasons of environmental impact, faulty traffic studies and NPDES requirements that have not been studied or met concerning flood control) and to resend [sic] the past zoning change on the grounds of misrepresentation and breach of verbal contract.

(Ex. 2 to Affidavit of Joan W. Hartley, attached as Ex. A to Petition for Attorneys' Fees, hereinafter "Hartley Aff."). It is clear that the Town opposed the planned development of the property for reasons which had nothing to do with the Department's approval of the SWPPP and authorization under the Construction General Permit. Moreover, as discussed above, the Town had no independent knowledge of facts supporting its appeal of the Department's grant of coverage to Roper Pond under the Construction General Permit. In fact, the record demonstrates that the appeal of the Department's decision was merely a means to stop or delay the planned development of the property.

The Department issued its decision to grant coverage to Roper Pond on December 15, 2008. On December 17, 2008, Mr. Thomas sent an email to Brian Bates regarding the appeal of the Department's decision. Mr. Thomas wrote as follows:

We have until December 30 (15 days) to file an appeal to the DEHEC Board. We need to review the approval and the revised plans to determine if we have a reason or cause to appeal to the Board, **and if not, can we still send in a blanket appeal to the DEHEC Board and delay the actual decision for 60 days.** We need to get our hands on the plans.

(Thomas Dep., Ex. 5, attached to Hartley Aff. as Ex. 15) (emphasis added). Again, Mr. Thomas could not identify any technical defect in the SWPPP at the time or later at his deposition, but determined to pursue an appeal of the Department's decision even if grounds for the appeal did not exist. Moreover, the purpose of such appeal was plainly stated as an effort to delay the planned development of the property by Roper Pond. Indeed, at the close of the December 17,

2008 email, Mr. Thomas wrote: **"Let me know where you think we can go to delay and/or stop this project."** (Thomas Dep., Ex. 5, attached to Hartley Aff. as Ex. 15) (emphasis added). The intent of this statement is borne out by the Town's efforts to oppose governmental authorization for the planned development at every turn. For example, Mr. Thomas contacted politicians and others to assist the Town in holding up South Carolina Department of Transportation approval for the Proposed Project. (Exs. 3 and 4 of Hartley Aff.). Additionally, at its October 2, 2008 council meeting, the Town adopted a resolution to the Richland County Planning Commission regarding development plans submitted to the County for the Proposed Project. (Thomas Dep., Ex. 6, attached to Hartley Aff. as Ex. 16). The Resolution advised the Commission of the Town's belief that the proposed development as multifamily high density apartments was "out of character and totally incongruous for the entire town, its neighborhoods, contiguous community and the intended zoning use as originally presented." *Id.* The resolution further requested that "an economic impact study be performed to determine the loss of property value to the homes in the adjacent Kaminer Station Subdivision, and homes directly affected across Trenholm Road and by adjacent nearby lakes, due to the proposed 204 apartments . . ." *Id.*

The Town participated in meetings with politicians in an effort to stop Roper Pond from receiving the government permitting for the Proposed Project. However, the record shows that such meetings were not intended to facilitate the correction of deficiencies in the SWPPP prepared by B.P. Barber on behalf of Roper Pond. In fact, the Town supported the exclusion of B.P. Barber from a meeting with Senator Joel Lourie as a strategy for further delaying the approval of the SWPPP. Brian Bates and Daniel Hill, both professional engineers and residents of the Town had been assisting the Town in its opposition to the Department's approval of the SWPPP. (See, e.g., Exs. 5, 6, 7, and 8 to Hartley Aff.). In a November 6, 2008 email, Mr.

Thomas requested that Mr. Bates and Mr. Hill attend a meeting with the Department and Senator Lourie to “review the revised set of BP Barber plans for the Roper Property.” (Ex. 8 to Hartley Aff.). Mr. Bates advised Mr. Thomas as follows:

Yes I can attend a meeting at that time. As for your phone message about BP Barber, I don't care if they are there, but letting them know our position on their design (assuming we find flaws) that quickly will just expedite their response. I would think that every day that this thing is not resolve is another day it isn't being built. Going through the system is a more formal, civil, and slower method in my opinion. I would rather them keep guessing what our next move is instead of confronting them. Just my thoughts.

(Ex. 9 to Hartley Aff.). Upon receipt of the following email message, Mr. Thomas responded: “I agree with you . . . I will let Joel know that You Danny and I can be there.” (Ex. 10 to Hartley Aff.) (ellipses in original). Mr. Thomas thereafter forwarded the email to Senator Lourie with his endorsement of the proposed strategy. (Exs. 11 and 12 to Hartley Aff.). There can be no doubt that the Town's “concerns” about the SWPPP were merely another avenue in response to Mr. Thomas's inquiry regarding “where you think we can go to delay and/or stop this project.” The Town intended to use all means available to delay or stop Roper Pond's development of the property as an apartment complex. Any concerns about the SWPPP were merely a pretext for stopping such development.

With respect to the Town's concerns regarding the SWPPP for the Proposed Project, the Town was afforded numerous opportunities to raise those concerns prior to the Department's decision to grant Roper Pond coverage under the Construction General Permit. Prior to the November 14, 2008 meeting with the Department staff at Senator Lourie's office, the Town and its technical advisors had reviewed the SWPPP and provided comments to the Department staff, which the staff unquestionably addressed. In an October 2, 2008 email, Mr. Thomas advised Mr. Bates as follows:

Thank you again . . . wish us luck Monday . . . Joel has received a copy of a letter DEHEC sent to the developer telling him that they had pulled the developer's application and want him to provide all documentation for additional review. Is the first flush requirements a possible application killer that would require them to reapply. If we could get to that point, we may have [a] chance to get them under the new rules if they approved before they have a chance to reapply. . . RT

(Ex. 14 to Hartley Aff.). It is apparent that the Town provided comments to the Department shortly after the Department staff took over the review of the SWPPP. In an October 29, 2008 email, Mr. Thomas forwarded the Department's review letter for the SWPPP to Mr. Bates and requested that Mr. Bates advise him "if we in Arcadia Lakes need to ask for more." (Ex. 5 of Hartley Aff.). Mr. Bates advised Mr. Thomas as follows:

Told you that "waters of the state for water quality" thing had teeth. They now have to show how they are going to collect, and hold for 24 hours, the first inch of runoff from the entire site, which will be approximately 36,000 cubic feet or 271,000 gallons. For visualization purposes, that would be a pond (like the one that was built for those 4 or 5 lots down Trenholm Road) that would be 3-ft. deep and 110-ft. X 110-ft. square or about the volume of the Rockbridge Club swimming pool. To account for that outside of the wetlands boundary, they are going to have to significantly revise the site plans.

I suggest we wait until they try to address this and then bring up the interpretation that this water must be segregated from all of the other runoff. To do that on dense site is an impractical endeavor at best and not usually required due to its complexity. However, a strict interpretation of the regulations indicates that it is required.

Id. (emphasis added). Mr. Thomas responded: "Thanks again for your continued expertise in this matter." *Id.* This email exchange unquestionably shows that the Town was raising technical issues to the Department staff, and the Department staff was adequately addressing those issues. More importantly, it shows that the ultimate objective in raising these issues was not to ensure that the SWPPP was technically sufficient to control the stormwater runoff on the property, but to identify potential obstacles to the development of the property. Otherwise, there would be no suggestion that "we wait until they try to address this and then bring up the interpretation that this water must be segregated from all of the other runoff." Indeed, the Petitioners offered no

evidence at the hearing that the concerns raised by the Town and other Petitioners were not fully considered by the Department staff and addressed by B.P. Barber prior to the Department's final decision.

In its effort to stop or delay the planned development of the property, the Town looked for any opportunity to delay the Proposed Project once it learned that the property would be developed as an apartment complex. While the Town typically included remarks related to the stormwater permitting in its laundry list of concerns regarding the Proposed Project, such remarks were clearly secondary and included merely as a means to identify yet another matter for which a governmental authority had oversight related to the development. For example, in the Town's resolution to the Richland County Planning Commission regarding development plans submitted to the County for the Proposed Project, the Town included a statement asserting that Richland County should give special consideration to the Proposed Project in order to protect the wetlands of the Gills Creek Flood Plan. (Thomas Dep., Ex. 6, attached to Hartley Aff. as Ex. 16). However, the primary concern raised was the impact on the "character" of the community and the loss of property value to neighboring homes as a result of the planned development as an apartment complex. *Id.*

To demonstrate that the Town acted without substantial justification in bringing this appeal, it is not necessary to show that the Town's claims were frivolous. *Heath*, 302 S.C. at 183, 394 S.E.2d at 712 (holding that "a court need not go so far as to brand a claim 'frivolous' in order for it to be found to be without substantial justification"). However, the Town's claims in this action were, in fact, frivolous. The law on the federal permitting requirements for the Proposed Project is well-settled. Yet, the Town continued to press its claims that the excavation of the Pond required a federal permit. Moreover, as the record clearly shows, the Town resolved

to take such action as necessary to stop or delay the Proposed Project, and the appeal of the Department's grant of coverage to Roper Pond under the Construction General Permit was but another avenue for accomplishing that objective. Moreover, as evidenced by Mr. Thomas's email of December 17, 2008, the Town intended to appeal that decision even if there were no grounds for such appeal. Indeed, the Town failed to offer any evidence of a technical deficiency in the SWPPP. Under the circumstances, it is indisputable that the Town acted without substantial justification in bring this action.

D. There are no special circumstances that would make an award of attorney's fees unjust.

Roper Pond has expended considerable time and money in defending the Town's challenge to the Department's grant of coverage under the Construction General Permit. The attorneys' fees and costs incurred by Roper Pond in association with this contested case to date total \$130,822. (See Affidavit of W. Thomas Lavender, Jr., attached to the Petition for Attorneys' Fees as Ex. B; Affidavit of Charles C. Mickel, attached to the Petition for Attorneys' Fees as Exhibit C). As discussed *supra*, the Town completely failed to advance any reasonable basis for its challenge to this Department's decision. Moreover, it is indisputable that the Town availed itself of this Court for the purpose of stopping or delaying the planned development of the Roper Pond property as an apartment complex, not to ensure that the Department properly granted coverage to Roper Pond under the Construction General Permit. As such, there are no special circumstances which would make an award of attorneys' fees and costs unjust. Indeed, the principles of justice and equity require the award of attorneys' fees and costs to Roper Pond. The Town has endeavored to stop Roper Pond's development as an apartment complex by any means necessary. The Town attempted a challenge to the rezoning of the Property, but such challenge was not timely. (Tr. p. 249, ll. 18-19; p. 250, ll. 1-11). The record clearly shows that

the Town brought this contested case without any independent belief that the Department's decision was improper. The Town's challenge to the Department's grant of coverage to Roper Pond under the Construction General Permit was merely another attempt to stop Roper Pond's development of the property because the Town opposed the development of the property as an apartment complex. There can be no justification for such action since the Roper Pond Property is outside of the corporate limits of the Town. Richland County—not the Town—has jurisdiction over zoning and land use issues affecting the Property. Simply stated, the Town abused the appeal process authorized under S.C. CODE ANN. § 44-1-60 and the Administrative Procedures Act, S.C. CODE ANN. §§ 1-23-10 *et seq.* ("APA") in order to redress claims which are properly addressed by and through Richland County zoning and land use authorities. S.C. CODE ANN. § 44-1-60 (Supp. 2009); S.C. CODE ANN. § 1-23-610(B) (Supp. 2009).

Additionally, the negative impact of the Town's improper challenge to the Department's decision in this case is significant and far-reaching. In opposing the lawful development of the Property, the Town is working at cross purposes with Richland County, the local government with authority over the development of the Property and whose citizens will directly benefit from such development. Indeed, the Town's challenge to the Department's decision has not only prevented Roper Pond from proceeding with the lawful development of the Property, but it has also deprived the citizens of Richland County and the State of much-needed stimulus to the economy and taxes and revenues for the County. Specifically, in the short term, the construction of the apartment complex will produce immediate economic benefits for construction workers and local businesses which have been negatively impacted by the current recession. Based on a model developed by the National Association of Home Builders, the short-term estimated local impact for the construction of the 204-unit apartment complex may be conservatively estimated

as follows: \$11.85 million in local income to construction-related businesses; \$1.24 million in taxes and other revenue for local governments; and 183 local jobs. In the long term, the planned development of the Property may be expected to generate annual recurring impacts of \$3.45 million in local income, \$592,500 in taxes and other revenue for local governments, and approximately 48 local jobs. (See Affidavit of Matthew H. Mundy attached to the Petition for Attorneys' Fees as Exhibit D). As such, there can be no special circumstances which would make an award of attorneys' fees unjust. The Town has taken deliberate action to impede a project which would provide direct and immediate economic benefits to the citizens of Richland County and the State at a time when it is desperately needed. Accordingly, the circumstances of this case clearly support the award of attorneys' fees to Roper Pond pursuant to Section 15-77-300 of the State Action Statute.

E. **Additionally, or in the alternative, Roper Pond is entitled to sanctions pursuant to Rule 72, SCRALC, in the form of attorneys' fees and costs and the cost of delay of the Proposed Project.**

In addition, or in the alternative, Roper Pond is entitled to an award of attorneys' fees and costs and the costs of the delay of the Proposed Project pursuant to Rule 72, SCRALC. There is no question that Petitioners' challenge to the Department's grant of coverage under the Construction General Permit was frivolous and/or taken solely for the purpose of delay. As discussed *supra*, Petitioners' primary objective in appealing the Department's decision in this matter was not to challenge the technical sufficiency of the SWPPP, but to stop or delay the construction of an apartment complex on the Roper Pond property.

Petitioners' own testimony indisputably demonstrates that they availed themselves of this Court solely for the purpose of delaying a project for which they believed the zoning was

improperly obtained, but could no longer be challenged. For example, Petitioner Linda Jackson testified as follows:

Q: And will this affect your use and enjoyment of the area?

A: Absolutely. I mean, it will be sad not to see the pond any more, to not be able to enjoy, but then I look at what's going to happen to the Cary Folks. I mean, they've been hit with it so many times. Dent Middle School, Richland County did all they were supposed to do, and DHEC did all they were supposed to do, but Cary Lake still ended up being compromised to a great extent by that construction, and you know it's just—the Gills Creek Watershed is very much impaired. There have been huge fines assessed against Richland County. There was even an article in the paper today about it, and it's only going to get worse. And what we would like to see is something that would be an amenity to the community and something that would—people would be proud of and want to participate, and I suspect if they had put up something like they wanted to put up and had told the community they were going to put up five years ago, we wouldn't be in this courtroom today, because what they proposed five years ago was something that the community supported enough not to object to the rezoning of the multi-family high density, and they would never have not objected had that been proposed almost five years ago that they were going to put up a 204 apartment complex. The whole community would have been there objecting there at Richland County, and you know what, not one sole appeared. The only person there was Mr. Joe Walker, and they laughed. I have the minutes from the meeting. They laughed because no one was there to object.

(Tr. p. 245, l. 6 – p. 246, l. 15) (emphasis added). Ms. Jackson further testified that the zoning “was obtained improperly,” but could no longer be appealed. (Tr. p. 249, ll. 18-19; p. 250, ll. 1-11). Similarly, Petitioner Elaine Starr testified:

Q: Well, if it were C-2, if I told you that it was C-2, and it would have allowed a shopping center there, what would your position have been?

A: Oh, I would have fought that, too.

Q: So, in other words, it's what they want to do with the property?

A: Right. It's the density. If they would change the density and put in some best management practice, I would say “Great, be a good neighbor.”

(Tr. p. 281, l. 23 – p. 282, l. 7). As discussed *supra*, in a December 17, 2008 email regarding the appeal of the Department's decision on the State Construction General Permit coverage for Roper Pond, Mr. Thomas wrote: "Let me know where you think we can go to delay and/or stop this project." (Thomas Dep., Ex. 5, attached to Hartley Aff. as Ex. 15). Indeed, a draft of the request for Board review of the Department's decision unquestionably demonstrates that the Petitioners' claims related to the planned development of the property had nothing to do with the Department's grant of coverage under the Construction General Permit. On December 30, 2008, the deadline for filing for Board review, Ms. Jackson forwarded a draft letter to Mr. Thomas. (Ex. 13 to Hartley Aff.). The draft letter raised any number of issues regarding the planned development of the property, but did not identify a single defect in the Department's grant of coverage under the Construction General Permit. The draft letter included the following claims:

Mr. Mundy, who signed the Notice of Intent for this project, has claimed for months that he is not the current owner of the land upon which the project is to be built. The current owner of record is Roper Pond, LLC of which Mr. Mundy was a member. According to Mr. Mundy, Roper Pond, LLC was sold to Capital Development, LLC in January of 2008, however, there is no deed of record to reflect a transfer of interest in the referenced real property. From what we know, the only member of Capital Development, LLC is Charles Mikel who lives in Greenville. This information may or may not have any impact on the decision to issue the stormwater permit, but we believe that the Board need to be informed about who is truly responsible in this situation.

What is significant in this matter is that Mr. Mundy came to the Arcadia Lakes community in May of 2004 with a plan for the subject property to be developed with high end, single-family patio homes with a transition-type design which moved from patio homes to multi-family condominium units, along with a clubhouse and other recreational areas. The original plan for the property was based on a density of approximately four (4) units per acre. The new plan for development of the property presented in early August of this year by Mr. Mundy has no provision for a transition, and in fact has total of eight (8) multi-family apartment buildings with an overall density of approximately sixteen (16) units per acre. We feel that this drastic change in the plans for the property was misleading to adjacent property owners and the local neighborhood in general. Had we not been presented a plan four years ago that was basically satisfactory to

the neighborhood, we never would have allowed the County rezoning process to move forward unchallenged. Essentially, the community was duped.

(Ex. 13 of Hartley Aff.). Although the Petitioners filed a different letter requesting Board review, this earlier draft by Mr. Jackson appears to express the real reasons behind the Petitioners' decision to appeal the Department's grant of coverage to Roper Pond. As noted above, the Petitioners unquestionably abused the appeal process authorized under S.C. CODE ANN. § 44-1-60 and the APA in order to redress claims which are properly addressed by local zoning and land use authorities. The evidence clearly demonstrates that Petitioners opposed the Proposed Project because of the proposed development as an apartment complex and simply used the appeal of the coverage under the Construction General Permit as a means to stop or delay the Project.

It is clear that Petitioners knew or should have known that there was no reasonable legal basis for its challenge to the Department's decision. Yet, Petitioners aggressively pursued their appeal. Indeed, as the Court found, Petitioners did not even establish standing to bring this contested case. (Final Order and Decision, pp. 17-18). At the hearing on the merits, Petitioners failed to identify any alleged harm that would result from the design of the stormwater management system approved by the Department. Instead, Petitioners testified about the damage resulting from the land-disturbing activities of other parties and those parties' failure to implement the measures required by the Department to control stormwater runoff and sedimentation during construction. The record is devoid of any evidence which would support a claim that the SWPPP as approved was not sufficient to manage the stormwater runoff and control sedimentation during the construction of the Proposed Project. Petitioners expert offered no opinion on the impact of the land-disturbing activities authorized under the Construction General Permit on the Pond or Cary Lake. (Tr. p. 203, ll. 18-23; p. 211, ll. 2-11). Ms. Jackson

testified that any negative impacts to Cary Lake would be the result of Roper Pond's failure to follow the Construction General Permit and the SWPPP during the construction of the Proposed Project. (Tr. p. 250, l. 16 – p. 251, l. 7). Ms. Starr testified that she believed that the Proposed Project would increase the rate of stormwater runoff. (Tr. p. 277, l. 24 - p. 281, l. 14). However, as this Court found, any such increase would be a violation of the Stormwater Regulation, and therefore Ms. Starr's concerns regarding an increase in the rate of stormwater runoff would be the result of a violation of the Construction General Permit, not of the Department's issuance of coverage to Roper Pond under the Construction General Permit. (Final Order and Decision, p. 20). Petitioner did not offer any evidence that the SWPPP approved for the Proposed Project was inadequate to control stormwater runoff and sedimentation during the planned development of the property.

Moreover, as discussed at length *supra*, Petitioners failed to advance any legitimate legal basis for its contention that the Department did not adequately review the SWPPP or improperly granted Roper Pond coverage under the Construction General Permit. Contrary to well-settled case law regarding permitting for the dredging of navigable waters of the United States and Petitioners' complete failure to offer any evidence that the Pond was a navigable water, which required a federal permit authorizing dredging activities, Petitioners continued to press their claim that a federal permit was required for such activities. Indeed, despite the lack of federal or state law supporting their claims, Petitioners continued to avail themselves of this Court and the discovery process authorized under the Rules of Procedure for the Administrative Law Court with full knowledge that Roper Pond was incurring great expense in legal fees and costs and was incurring significant costs associated with the delay of the Proposed Project. The record clearly shows that Petitioners continued to pursue their claims in the Court with the knowledge that there

was no legal basis for such claims, but did so in order to delay and/or stop the planned development of the property as an apartment complex.

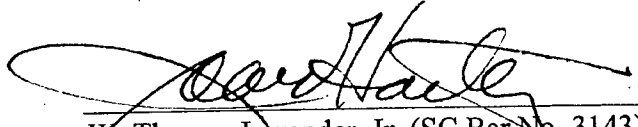
There is no doubt that Petitioners' appeal of the Department's decision in this matter is "frivolous or taken solely for the purposes of delay." The evidence on the record unquestionably demonstrates that Petitioners initiated this contested case for the sole purpose of delaying the Proposed Project. Petitioners either knew or should have known that its claims were without merit. Indeed, Mr. Thomas testified that he has the education and experience to evaluate the sufficiency of the design of Roper Pond's SWPPP. Moreover, during the course of the Department's review of the SWPPP, the Town and other Petitioners also received the advice of other engineers who reviewed the SWPPP to assess its technical sufficiency. (Exs. 6, 7, 8, 9, and 14 to Hartley Aff.). Yet, despite his own education and experience and the advice received from other engineers, Mr. Thomas could not independently identify any deficiency in the SWPPP. Moreover, in a draft letter requesting Board review of the Department's decision, Ms. Jackson argued that Roper Pond had allegedly misled the community to secure rezoning, but failed to identify a legitimate basis for appealing the Department's grant of coverage to under the Construction General Permit. Indeed, in the hearing on the merits, Ms. Jackson testified that if Roper Pond had proceeded with their original planned development of the property, "we wouldn't be in this courtroom today." (Tr. p. 245, l. 6 – p. 246, l. 15). Petitioners have unquestionably abused the appeal process established under S.C. CODE ANN. § 44-1-60 and the APA.

Rule 72, SCRPAALC, authorizes this Court to impose such sanctions "as the circumstances of the case and discouragement of like conduct in the future may require." Rule 72, SCRPAALC. The objective of discouraging like conduct in the future can only be achieved by shifting the cost

of defending this action and the delay of the Proposed Project from Roper Pond to Petitioners. Otherwise, Petitioners have achieved their stated and improper objective of delaying the Proposed Project by preventing the commencement of construction for more than sixteen months. Not only has such action unnecessarily expended valuable judicial resources, it has caused significant economic harm to Roper Pond. In addition to the attorneys' fees and costs associated with the defense of Petitioners' challenge, Roper Pond has incurred costs in the amount of \$510,430 as a direct result of the delay of the Proposed Project during the pendency of this action. (See Affidavit of Charles C. Mickel, attached to the Petition for Attorneys' Fees as Exhibit C). Roper Pond therefore requests the Court issue an order imposing sanctions in the form of an award of attorneys' fees and costs and the cost of delay of the Proposed Project in the amount of \$641,252.

III. CONCLUSION

For all the foregoing reasons, Roper Pond asks the Court for an Order directing the Town to pay Roper Pond's reasonable attorneys' fees and costs in the amount of \$130,822 pursuant to S.C. CODE ANN. § 15-77-300. Additionally, or in the alternative, Roper Pond asks the Court to impose sanctions on Petitioners in the form of an award of attorneys' fees and costs and the cost of delay of the Proposed Project in the amount of \$641,252 pursuant to Rule 72 of the South Carolina Rules of Procedure for the Administrative Law Court.



W. Thomas Lavender, Jr. (SC Bar No. 3143)

Joan W. Hartley (SC Bar No. 72735)

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Attorneys for Respondent

Roper Pond, LLC

April 19, 2010

Columbia, South Carolina

A

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW JUDGE DIVISION**

Town of Arcadia Lakes, Robert L. Jackson,
Linda Z. Jackson, Robert E. Williams, Barbara
S. Williams, Elizabeth M. Walker, Louis E.
Spradlin, Mary Helen Spradlin, Thomas Hutto
Utsey, Tony Sinclair, Aaron Small, Bette
Small, Gene F. Starr, M.D., Elaine J. Starr,
Sanford T. Marcus, Ruth L. Marcus, and
Steven Brown,

Petitioners,

vs.

South Carolina Department of Health and
Environmental Control and Roper Pond, LLC,

Respondents.

Docket No.: 09-ALC-07-0069-CC

AFFIDAVIT OF JOAN W. HARTLEY

PERSONALLY APPEARED BEFORE Joan W. Hartley, who, after being duly sworn,
deposes and says that:

1. I am an associate in the firm of Nexsen Pruet, LLC, 1230 Main Street, Suite 700, Columbia, South Carolina 29201. I am an attorney of record in the above-captioned case, and I submit this affidavit in support of Respondent Roper Pond, LLC's Motion for Attorneys' Fees and Costs and for Sanctions Pursuant to Rule 72, SCRPAALC, in this action.

2. On May 20, 2009, Respondent Roper Pond, LLC served a subpoena on SCANA Corporation, a copy of which is attached hereto as Exhibit 1. Attached hereto are true and correct copies of the following documents which were produced by SCANA Corporation in response to the May 20, 2009 subpoena:

Exhibit 2: August 23, 2008 emails regarding "Affidavits (Who, What, When, Where, and Why from parties solidicated)" and Bates labeled SCANA - 0070-

0072;

- Exhibit 3: December 17-19, 2008 emails regarding "Rick Thomas – Roper Pond Project Request" and Bates labeled SCANA – 0896-0897;
- Exhibit 4: December 17, 2008 email regarding "Roper Pond Appeal-DOT" and Bates labeled SCANA – 0867;
- Exhibit 5: October 28-29, 2008 emails regarding "Follow-up – Roper Pond Apartments" and Bates labeled SCANA – 0652-0653;
- Exhibit 6: October 5, 2008 email with attachment regarding "letter kaminer sta" and Bates labeled SCANA – 0583-0585;
- Exhibit 7: October 2, 2008 emails with attachment regarding "Roper Latest revised revision" and Bates labeled SCANA – 0500-0503;
- Exhibit 8: November 6, 2008 email regarding "Roper Property – Meeting next Friday, Nov. 14th" and Bates labeled SCANA – 0697;
- Exhibit 9: November 6, 2008 emails regarding "Roper Property – Meeting next Friday, Nov. 14th" and Bates labeled SCANA – 0698;
- Exhibit 10: November 6, 2008 emails regarding "Roper Property – Meeting next Friday, Nov. 14th" and Bates labeled SCANA – 0699;
- Exhibit 11: November 6, 2008 emails regarding "Roper Property – Meeting next Friday, Nov. 14th" and Bates labeled SCANA – 0701;
- Exhibit 12: November 7, 2008 email regarding "Friday – Nov. 14th Meeting Confirmed" and Bates labeled SCANA – 0704;
- Exhibit 13: December 30, 2008 email with attachment regarding "(no subject)" and Bates labeled SCANA – 0906-0908;
- Exhibit 14: October 2, 2008 email with regarding "Roper Planning Comm Revision #2" and Bates labeled SCANA – 0496.

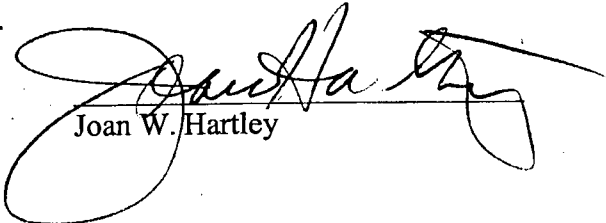
3. On August 19, 2009, Respondent Roper Pond, LLC, deposed Richard W. Thomas, Jr., the Rule 30(b)(6) designee for Petitioner Town of Arcadia Lakes. This deposition was admitted at trial as Petitioners' Exhibit 1. Attached hereto are true and correct copies of the following documents which were exhibit to this deposition:

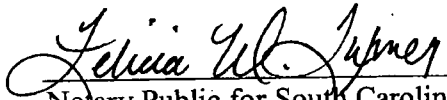
Exhibit 15: December 17, 2008 email regarding "Roper Pond Apartments" - Exhibit 5 to the Deposition of Richard W. Thomas, Jr.;

Exhibit 16: October 2, 2008 Resolution of the Town of Arcadia Lakes - Exhibit 6 to the Deposition of Richard W. Thomas, Jr.;

FURTHER AFFIANT SAYETH NOT.

SWORN and subscribed to before me
this 23 day of March, 2010.


Joan W. Hartley

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 12/17/2018



Re-order from Bushnell Company
(215) 842-9520
www.BushnellCo.com



0285

NEXSEN | PRUET

Joan W. Hartley
Associate
Admitted in SC, NC

May 20, 2009

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

SCANA Corporation
c/o CT Corporation System
75 Beattie Place
Greenville, SC 29601

Re: *Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown v. South Carolina Department of Health and Environmental Control*
Docket No. 09-ALC-07-0069-CC

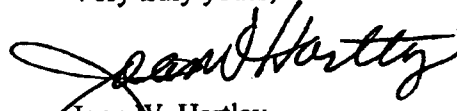
Dear Sir or Madam:

Charleston
Charlotte
Columbia
Greensboro
Greenville
Hilton Head
Myrtle Beach

Enclosed please find a *Subpoena Duces Tecum* issued in connection with the above-referenced matter. You will note that this Subpoena is for records only. You may mail the described documents to my attention at Nexsen Pruet, LLC at 1230 Main Street, Suite 700, Columbia, SC 29201 prior to Friday, June 5, 2009, in lieu of appearing on that date. We will be glad to reimburse you for any reasonable copying costs associated with producing these documents.

Please feel free to call me if you have any questions. Thank you for your cooperation and assistance.

Very truly yours,



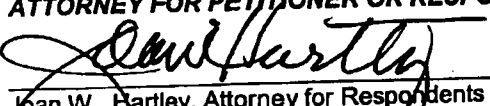
Joan W. Hartley
Enclosure

cc: James S. Chandler, Jr., Esquire
Stephen P. Hightower, Esquire
Francis P. Mood, Esquire

1441 Main Street
Suite 1500 (29201)
PO Drawer 2428
Columbia, SC 29202
www.nexsenpruet.com

T 803.540.2129
F 803.253.8277
E JHartley@nexsenpruet.com
Nexsen Pruet Adams Kleemler, LLC
Attorneys and Counselors at Law

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Petitioners, South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.		SUBPOENA IN A CIVIL CASE Case Number: 09-ALC-07-0069-CC SUBPOENA DUCES TECUM	
TO: SCANA Corporation c/o CT Corporation System 75 Beattie Place Greenville, SC 29601			
☐ YOU ARE HEREBY COMMANDED to appear at the place, date, and time specified below to testify in the above case.			
PLACE OF TESTIMONY		COURTROOM	
		DATE AND TIME:	
☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify in the above case.			
PLACE OF DEPOSITION:		DATE AND TIME	
☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects): SEE EXHIBIT A			
Nexsen Pruet, LLC 1230 Main St., Ste. 700 Columbia, SC 29201		DATE AND TIME June 5, 2009 at 5:00 p.m.	
☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.			
PREMISES		DATE AND TIME	
ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS SUIT IS HEREBY DIRECTED PURSUANT TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, AND SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH THE PERSON WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS, THE PERSON SO DESIGNATED SHALL TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION.			
ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER Joan W. Hartley, Esquire NEXSEN PRUET, LLC 1230 Main Street, Suite 700 Columbia, SC 29201 803.540.2199			
I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1) AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES			
ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PETITIONER OR RESPONDENT)  Joan W. Hartley, Attorney for Respondents		DATE May 20, 2009	

(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on Next Page)

PROOF OF SERVICE		
SERVED	DATE	MANNER OF SERVICE
SERVED ON (Print Name)		TITLE
DECLARATION OF SERVER		

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
(Date)

Signature of Server

Address of Server

Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d):

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance; or
(ii) requires a person who is not a party or an officer, director or managing agent of a party to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from the county where the subpoena was served to the place within the state where the trial is held, or

(iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer, director or managing agent of a party to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

EXHIBIT A

All e-mail communications sent from or received by Richard Thomas on any SCANA e-mail account to which Richard Thomas has access and relating to the proposed development of property located at 6837 North Trenholm Road in Richland County, including, but not limited to, the following search terms in any field:

- a. Trenholm;
- b. Roper ;
- c. Mundy;
- d. Bob Mundy;
- e. Matt Mundy;
- f. Walker;
- g. Joe Walker;
- h. Mickel;
- i. Charlie Mickel;
- j. Joel Lourie;
- k. Lourie;
- l. DHEC;
- m. Magwood;
- n. Brunson.

From: Rick Thomas [rwthomasjr@sc.rr.com]
Sent: Saturday, August 23, 2008 12:43 PM
To: Unda8@aol.com
Cc: LinBobJack@aol.com; arctwn@sc.rr.com; Doug Marks; THOMAS, RICHARD W JR
Subject: Affidavits (Who, What, When, Where, and Why from parties solicited)
Categories: Green Category

Confidential

Affidavit from Rick Thomas, Mayor 8/23/08

Charlie,

Bob Munday and Joe Walker both met with us two times three + years ago.....Christine is looking up the date they met with members of council at her house (town hall)to make a presentation and solicit our town blessing for them to rezone the property "high density" so that they could build high end zero lot line condos and patio homes "in order to make the numbers work on developing the property." Plan views and renderings of building designs were shown and agreed upon by the council members present. Later they made a similar presentation to the residents in Kaminer Station at Doug Mark's residence where they made the same presentation with the reason for the zoning change to be that they could build high end zero lot line condos and patio homes in order to make the numbers work on developing the property. I continued to follow up with Joe Walker on a periodic basis to determine the timing and status of the project. He continued to tell me that the project was forth coming as planned but was delayed due to their busy schedule with a Charleston development they had underway. A month ago I was informed in a phone call to Joe Walker that the property had been sold. He indicated that he would get back to me with the buyer's name and number. Then within several weeks, I received notice from Richland County that the same developer was securing permission to build multifamily apartments. No effort was made to inform the town or the Kaminer residents of this design change until he was confronted by town and neighborhood members after the letter from the county was received. It was not until two weeks ago that the new owner, Mr. Charles Nichol called to introduce himself to me. He indicated by phone that he planned to build high end apartments with the intention to sell them as condos within three to five years when the housing market turned around. Bob Munday and his development group then met at my request with council at the August town council meeting of which we have recorded .

I believe that the town was misled and deceived in the initial meetings 3+ years ago when the same developer came to us for our support and the support of the adjacent neighborhood to rezone and then used the rezoning to restructure his

SCANA - 0070

6/12/2009

0291

plans for monetary gain. Per conversations with Mr Carter Ellis, the same was told to the property owners on the north side of the Roper Property to get their blessing for the rezoning. The town should use all necessary means to go before the Richland County Planning Commission and appeal the August 21 Planning Committee recommendation (on numerous reasons of environmental impact, faulty traffic impact studies and NPDES requirements that have not been studied or met concerning flood control) and to resend the past zoning change on the grounds of misrepresentation and breach of verbal contract. This same developer was charged and convicted of the same shortcomings and fines from the circuit court upheld by the SC State Supreme Court with required to the 42 Magnolia Development which he spoke of in his presentation last Thursday at the county meeting as an example of his fine work, never mentioning his law suits. Similar breeches were made during development within the city of Columbia in the past year. Linda Jackson our neighborhood legal council has knowledge of this action.

Thank You,

Rick Thomas
Mayor

----- Original Message -----

From: Unda8@aol.com
To: rwthomasjr@sc.rr.com
Cc: ccook@elliottlaw.us ; Unda8@aol.com ; ccook005@sc.rr.com
Sent: Saturday, August 23, 2008 7:58 AM
Subject: Affidavits (Who, What, When, Where, and Why from parties solicited)

Mayor Ric Thomas

Confidential Attorney Communication
Town of Arcadia Lakes

From: Charles H Cook, Town Attorney

Ric:

I need a substantive affidavit from you, one from Doug Marks and any other parties who had discussions with principles of Estates, LLC or Individual names of persons or whoever about the change in the zoning three years ago. The flow of the statement would be:

"Who you are and here of course you would be Mayor and resident;
 What was told and presented in the meeting, by who and
 anybody else in the meeting who spoke or heard; when, where, and combining
 with the who, the why."

Take a stab at writing and coming up with the closest facts you can sustain and remember. I will put the affidavits into format and then they will read as sworn statements and be notarized."

My approach will be to provide information which could be used to show a Court (county council) that the present zoning is flawed since the parties sought to mediate with the Town that there would be high end condominiums thereby quieting the concerns which would have be protested otherwise. (This is slim but does have value in the appeal process for truth and emotion.)

SCANA - 0071

6/12/2009

0292

Time is important: Preparation and Memory Affidavits are sworn!!

Attached is a picture made from behind my dock on Lake Cary showing what we have to lose in Arcadia Lakes if things keep progressing with hollow promises of developers.

chc
Saturday 8-23-08

It's only a deal if it's where *you* want to go. Find your travel deal [here](#).



From: THOMAS, RICHARD W JR
Sent: Friday, December 19, 2008 11:01 AM
To: John Hardee
Subject: Rick Thomas - Roper Pond Project Request
Categories: Green Category

J,
Thank You very much for your assistance in this matter.
RT

From: John Hardee [mailto:jhardee@lamar.com]
Sent: Friday, December 19, 2008 10:39 AM
To: THOMAS, RICHARD W JR
Subject: FW: Rick Thomas - Roper Pond Project Request

Rick, thought you might want to see the attached email. Call me when you get a chance at 315-1140.

JNH

-----Original Message-----
From: Chapman, Tony L [mailto:ChapmanTL@dot.state.sc.us]
Sent: Thursday, December 18, 2008 6:24 PM
To: Hardee, John N
Subject: FW: Rick Thomas - Roper Pond Project Request

fyl

From: Brunson, Thad
Sent: Thursday, December 18, 2008 5:11 PM
To: Chapman, Tony L
Cc: Magwood, Tony; Motley, Brian O; Sawyer, Ed; Bramlitt, Glen A.; Dickinson, Robert C; Reed, Walter A
Subject: RE: Rick Thomas - Roper Pond Project Request

Mr. Chapman,

According to my staff, a permit for the Roper Pond Development on Trenholm Road was submitted to Richland Maintenance on July 14, 2008. The initial review revealed numerous missing permit documents (including stormwater calculations) which were necessary for permit review. The permit was returned to the applicant by letter dated July 28, 2008 requesting the additional information be included with their re-submittal. As of today's date, the applicant has not re-submitted the permit.

I have instructed my staff to notify me if and when the permit is re-submitted and to hold the permit until instructed by your office to proceed with processing.

Let me know if you have questions or need further information.

SCANA - 0896

6/15/2009

0295

M. Thad Brunson, P.E.
District #1 Engineering Administrator
(803) 737-6660

From: Chapman, Tony L
Sent: Wednesday, December 17, 2008 1:54 PM
To: Brunson, Thad
Cc: Watson, Clem
Subject: FW: Rick Thomas - Roper Pond Project Request

As we discussed, please track down and discuss with me. Thanks.

From: John Hardee [mailto:jhardee@lamar.com]
Sent: Wednesday, December 17, 2008 11:03 AM
To: Chapman, Tony L
Subject: FW: Rick Thomas - Roper Pond Project Request

Tony, please see the email from Mayor Thomas. Your assistance would be appreciated. Senator Lourie is suppose to contact Commissioner Taylor about this also. He is suppose to talk to someone at DOT about this. They didn't know who he was going to contact, but I imagine it will be either you or Buck.

-----Original Message-----

From: THOMAS, RICHARD W JR [mailto:RWTHOMAS@scana.com]
Sent: Wednesday, December 17, 2008 8:22 AM
To: jhardee@lamar.com
Subject: Rick Thomas - Roper Pond Project Request

John,

Please ask SCDOT to hold off on any approval of the Roper Pond Project at 6837 North Trenholm Road (general permit coverage number SCR10J889) until I can meet with them and our engineers to discuss our concerns about the way the project has been designed and how we believe it will affect Trenholm Rd., Cary Lake, Gills Creek and Jackson Creek.

Thank You,

Richard W. Thomas, Jr. (Rick)
Mayor
Town of Arcadia Lakes
803-217-9261 (o)
803-530-0390 (c)
rwthomas@scana.com

From: THOMAS, RICHARD W JR
Sent: Wednesday, December 17, 2008 9:11 AM
To: JOEL LOURIE
Subject: Roper Pond Appeal-DOT
Categories: Green Category

Joel,
Please remember to contact SCDOT about holding approval of the Roper Project until we can have our engineers meet with them about our concerns.
Thanks,
Rick t

Richard W. Thomas, Jr. (Rick)
803-217-9261 (o)
803-530-0390 (c)
rwthomas@scana.com

SCANA - 0867

6/15/2009

0298

From: THOMAS, RICHARD W JR
Sent: Wednesday, October 29, 2008 2:03 PM
To: Bates, Brian
Subject: RE: Follow-up - Roper Pond Apartments
Categories: Green Category

All things are confidential!
Thanks

From: Bates, Brian [mailto:Brian.Bates@Woolpert.com]
Sent: Wednesday, October 29, 2008 1:53 PM
To: THOMAS, RICHARD W JR
Subject: Re: Follow-up - Roper Pond Apartments

Out of respect for my colleagues I will not speculate on that.

----- Original Message -----
From: THOMAS, RICHARD W JR <RWTHOMAS@scana.com>
To: Bates, Brian
Sent: Wed Oct 29 13:50:38 2008
Subject: Follow-up - Roper Pond Apartments

CONFIDENTIAL!

BB,
Thanks again for your continued expertise in this matter.....
PS: Why would BP Barber not have planned for this in the beginning.....are they not suppose to be experts?
RT

-----Original Message-----
From: Bates, Brian [mailto:Brian.Bates@Woolpert.com]
Sent: Wednesday, October 29, 2008 12:03 PM
To: THOMAS, RICHARD W JR
Subject: RE: Roper Pond Apartments

Told you that "waters of the state for water quality" thing had teeth. They now have to show how they are going to collect, and hold for 24 hours, the first inch of runoff from the entire site, which will be approximately 36,000 cubic feet or 271,000 gallons. For visualization purposes, that would be a pond (like the one that was built for those 4 or 5 lots down Trenholm road) that would be 3-ft. deep and 110-ft. x 110-ft. square or about the volume of the Rockbridge Club swimming pool. To account for that outside of the wetlands boundary, they are going to have to significantly revise the site plans.

I suggest we wait until they try to address this and then bring up the interpretation that this water must be segregated from all of the other runoff. To do that on dense site is an impractical endeavor at best and not usually required due to its complexity. However, a strict interpretation of the regulations indicates that it is required.

Thanks for keeping me in the loop.

SCANA - 0652

6/15/2009

0300

Re: Follow-up - Roper Pond Apartments

Brian T. Bates, PE
Associate
Woolpert, Inc.
2000 Center Point Drive, suite 2200
Columbia, SC 29210
803.214.5884

-----Original Message-----

From: THOMAS, RICHARD W JR [mailto:RWTHOMAS@scana.com]
Sent: Wednesday, October 29, 2008 11:35 AM
To: Bates, Brian
Subject: Roper Pond Apartments

CONFIDENTIAL

Brian,
Attached is the reply to BP Barber and the Roper Developers on their DEHEC review. Please let me know if we in Arcadia Lakes need to ask for more? Give me a call when you can.....217-9261 (o)...530-0390 (cell)
Rick Thomas

-----Original Message-----

From: Jill C. Stewart [mailto:STEWARJC@dhec.sc.gov]
Sent: Tuesday, October 28, 2008 5:06 PM
To: jbl@scsenate.org
Cc: Ann Clark; Wanda C. Crotwell; John T. Litton; Robin S. Stephens; David Wilson
Subject: Roper Pond Apartments

Senator Lourié,

My name is Jill Stewart and I am the manager of the Stormwater Permitting Section at DHEC. Ann Clark asked that I forward you a copy of my review letter for Roper Pond Apartments located in Arcadia Lakes. My review letter is attached. If you have any questions concerning any of the comments, please feel free to give me a call.

Thanks,

Jill C. Stewart, P.E.
Manager, Stormwater Permitting Section
Bureau of Water
(803)898-0439

SCANA - 0653

6/15/2009

0301

From:
Sent:
To:
Subject:

Daniel B. Hill [dhill@truvista.net]
Sunday, October 05, 2008 10:27 AM
THOMAS, RICHARD W JR; 'Doug Marks'; linbobjack@aol.com
letter kaminer sta

Categories:
Attachments:

Green Category
letter kaminer sta .doc



letter kaminer sta
.doc (31 KB...

Hill Engineering, LLC

October 3, 2008

To Whom It May Concern:

Re: Engineering Credentials/Review of Plans of Roper Pond Development as prepared by B. P Barber dated June 28, 2008

I am registered and perform engineering work in North and South Carolina. My experience consists of consulting engineering work for several cities, towns, developers, water and sewer districts and counties for over 37 years.

I design water and sewer systems, pumping stations, subdivisions, storm sewer systems and Storm Water Pollution Prevention Plans.

I have reviewed the Roper Pond plans and have concerns about the following items listed in the Town of Arcadia Lakes and Kaminer Station Subdivision development questions:

1. Item # 3. The +/- 9.9 acre disturbance is apparently an approximation. It seems that this would be an exact number due to the impact of this disturbance on the existing wetlands which are only protected by a double row of silt fencing.
2. Item # 7. The use of existing waters of the state for water quality requirements (Roper Pond) is not acceptable. The proposed storm drainage system has only inlet protection at the catch basins and if that fails or is not in place at the specific time of construction that we have a storm event then the silt will be deposited in Roper Pond or the existing wetlands.
3. Item # 9. Lowering of the permanent pond elevation by 2.1 feet will have a significant impact on the existing wetlands due to the draining of the wetlands above the pond. Roper pond is a spring fed pond that maintains a full pool of water thereby enhancing the wetlands directly upstream of the pond.
4. Item # 11. It appears that an incorrect surface area of Roper Pond has been used for the design calculations. For instance the surface area at elevation 215.09 = 54,584 sf and at elevation 213.00 = 55,927 sf. which means that as the surface elevation increases the pond gets smaller. We don't know how this effects the calculations but we do know that the input into the software is what determines the software output.

Hill Engineering, LLC

5. Item # 13. The existing 36 inch RCP under North Trenholm Road between Roper Pond & Cary Lake is 30 + years old. This pipe is of sufficient capacity to handle the 100 year storm event using the B.P. Barber Water Summary data for the Roper Pond Project. However, this is only true if the pipe is in good condition and the flow is unimpeded. Given the fact that even a moderate thunderstorm now causes flooding on North Trenholm Road at the Roper Property, we do not believe the existing drainage system will handle the 100 year storm drainage event.
6. Item # 15. In 2007 we had a sewer overflow into the Kaminer station pond from the sewer line that runs along the pond and eventually into the same line that will also accept the sewer from these proposed apartments. We have previously asked for this to system to be evaluated but have now received a response.

Daniel B. Hill PE

From: THOMAS, RICHARD W JR
Sent: Thursday, October 02, 2008 9:49 AM
To: THOMAS, RICHARD W JR; Daniel B. Hill; Doug Marks; linbobjack@aol.com; Bates, Brian
Subject: RE: Roper Latest revised revision
Categories: Green Category
Attachments: Roper Planning Questions 10-2-08.doc

Sorry for the earlier email that left off the attachment....my secretary, Doug Marks, caught the error!
RT

From: THOMAS, RICHARD W JR
Sent: Thursday, October 02, 2008 9:46 AM
To: 'Daniel B. Hill'; 'Doug Marks'; 'linbobjack@aol.com'; 'Bates, Brian'
Subject: Roper Latest revised revision

Linda,
See attached.....includes Danny's, Rick's & Brian's changes.
Please format for the final copy to be prepared for the planning commission.

Also,
Linda,
Please give Danny a call (730-5893)_to prepare a affidavit on his qualifications to attach to what we give to commission.
Thanks,
Rick T.

See all of you (except Brian) at my house Sunday night at 7:00pm for a dress rehearsal.
RT

SCANA - 0500

6/15/2009

0307

Town of Arcadia Lakes and Kaminer Station Subdivision development questions and concerns for the Richland County Planning Commission meeting of October 6, 2008 concerning our appeal of the Roper Pond Development.

1. We, the citizens of the Town of Arcadia Lakes believe that the type of complex proposed by the developer is totally out of character for the entire neighborhood and contradicts the purposes of the Land Development ordinances of the county. In light of this, will the County require an economic impact study be run to determine the loss of property value to the homes in Kaminer Station, Town of Arcadia Lakes and homes directly across Trenholm Road due to 204 apartments being constructed in a single family, owner occupied, neighborhood?
2. Will the County accept responsibility for the loss in value in these homes by their approval of this project in that apartment rental units are not in keeping with the economic structure of the adjacent area subdivision and town?
3. There is a threshold at the 10 acre disturbance level for Storm Water Pollution Prevention Plan (SWPPP) rules and regulations. The environmental study submitted to the county by BP Barber for this project indicates there is approximately 9.9 acres of disturbed land. What is the exact area of property in the Roper Project that will be disturbed? This acreage should be determined using existing Roper Pond elevations and not lowered elevations to meet future volume holding requirements in 50 and 100 year flood conditions.
4. Will the developer be required to redesign according to the SWPPP rules and regulations if the disturbed area is determined to be actually 10 acres or greater?
5. Richland County as an NPDES Phase 1 Permittee (of which the Town of Arcadia Lakes is a co-permittee with Richland County) is required to pay special attention to endangered waters. The Gills Creek Flood Plain, of which the Roper Property project is a part, is designated as **impaired waters**. Therefore, Richland County has the obligation to require special restrictions over and above their current standards to protect these wetlands of Richland County and the adjacent Town of Arcadia Lakes. What has been added in this project's restrictions, rules, and regulations to address this requirement?
6. In light of the fact that Richland County is under a pending eight million dollar fine for NPDES Rules infractions, will the new more stringent storm water ordinance revisions under review today by the planning commission (which the EPA has required to be implemented by Richland County to mitigate this eight million dollar fine) be applied to this Roper Property Development if and when approved by Richland County Council before this project breaks ground, and, will the developer be required to redesign his project to meet these new rules?

7. The BP Barber Water Quality calculations for this project use Roper Pond to mitigate and meet the standards for the First Flush requirements of the South Carolina Stormwater Management and Sediment Control Act rules and regulations to retain ½ inch over the entire drainage area and to retain said water for the required 24 hour period. These wetlands and pond are defined as Jurisdictional Waters of the State. Why was this plan approved when it is *against* the EPA NPDES Rules and Regulations to use Jurisdictional Waters to mitigate the first flush requirements? Please note that, if wet detention is not used for the first flush control, 1-inch over the entire disturbed area must be detained for a 24 hour period.
8. Will the County require the developer to redesign the project to meet these State and County first flush rules and regulations or face additional fines from SCDHEC and EPA if the rules are not followed?
9. The Jurisdictional Wetlands in the headwaters of Roper Pond exist in their current state and location because of the current normal water surface elevation in the pond and adjacent headwaters. A reduction of 2.1 feet (as required in the BP Barber Report) will have significant impact. Did the wetlands impact permit include reducing the normal water surface elevation of Roper Pond and thereby impacting the existing wetlands around the pond and around the adjacent headwaters? We would like a written answer to this question.
10. If the wetlands permit application did not include this important information, then the current permit (if obtained) is invalid and must be re-submitted. Will the County investigate this issue and require re-submittal of wetland impact permits if this information was not included in the current permit application?
11. The BP Barber report data submitted on page 53 with regard to the Roper Pond elevations and associated surface areas under "Custom Stage Data" for the 215.09 elevation states an area of 54,584 square feet. This area was used in their flood quantity calculations. This area is not compatible with the surface areas calculated for the 213.00 and 215.74 elevations. Is this area data correct?
12. If this area data is not correct, how will correct data affect the outcome of the report and project with regard to the NPDES and SWPPP rules and regulations?
13. The 36 inch RCP (Reinforced Concrete Pipe) under N. Trenholm Road between Roper Pond and Cary Lake is 30+ years old. According to our storm water consultant's (Mr. Daniel Hill) calculations, for this pipe to meet the 100 year storm flood flow rate requirements, said pipe could have to be at new pipe capacity. If it is not in new pipe condition, water will overflow N. Trenholm Road in a 100 year flood event? This was determined using the volumes and flow rates presented in the Roper Project BP Barber report. Will the county require a video inspection of the inside of this pipe to determine if its current carrying capacity is equal to a new 36 inch diameter pipe.

14. Currently a moderate thunderstorm floods Trenholm Road at the Roper Property site . We have current pictures and videos to prove this fact. How can the existing pipe (even if determined to be in new condition) carry the 100 year flood capacity when it will not currently carry the water from a moderate size thunderstorm?
15. The Town of Arcadia Lakes currently has a total of 405 individual residences and no multifamily residences. In the past several years the sewer lines in the N. Trenholm areas of Kaminer Station and the Town of Arcadia Lakes have overflowed into our neighborhoods and lakes due to capacity carrying issues. Our storm water consultant , Mr. Daniel Hill, is a witness to this fact. Will Richland County require studies to insure that the ERCPSD sewer lines are adequate?
16. If the sewer system is discovered not to be adequate, will the county require the developer to enlarge the sewer system to handle the 50% increase in additional capacity needs and demand put on the system by the addition of 204 apartment units?
17. If this issue is not addressed , will the County be responsible for any environmental damage caused by such overflows if they occur in the future due to overflows?
18. Will security fencing be required between the 204 Unit Apartment complex and the adjacent single family Kaminer Station Subdivision to insure the security and privacy for the adjacent neighborhood and its residents?
19. If the county does not require security fencing, will the County be responsible for security breaches in the adjacent single family owner occupied neighborhood by residents of the non owner occupied rental units?
20. The maximum height requirement for all structures in the Richland County Planning Review Team report is 45 feet. The developer's plans show 45 feet plus 5 feet of roof which equals 50 feet total. Will the buildings be lowered or the number of floors be reduced to meet this precondition requirement?
21. There are more than 30 parking spaces facing into the adjacent Kaminer Station subdivision. Will the county, as part of their light ordinance, provide for proper screening and fencing to ensure the light from the head lights of these parked cars does not intrude onto Kaminer Station Property?

From: THOMAS, RICHARD W JR
Sent: Thursday, November 06, 2008 3:32 PM
To: Daniel B. Hill
Cc: Bates, Brian
Subject: Roper Property - Meeting next Friday, Nov. 14th
Categories: Green Category

Brian and Danny,

Can you meet next Friday afternoon (November 14th) in Joel Lourie's Conference room at the Gressette Bldg with DEHEC to review the revised set of BP Barber plans for the Roper Property? Estimated time of meeting 2:30 pm.....may change to 3:00.
Rick T.

SCANA - 0697

6/15/2009

0312

From: Bates, Brian [Brian.Bates@Woolpert.com]
Sent: Thursday, November 06, 2008 4:28 PM
To: THOMAS, RICHARD W JR
Subject: RE: Roper Property - Meeting next Friday, Nov. 14th
Categories: Green Category

Yes I can attend a meeting at that time. As for your phone message about BP Barber, I don't care if they are there, but letting them know our position on their design (assuming we find flaws) that quickly will just expedite their response. I would think that every day that this thing is not resolved is another day it isn't being built. Going through the system is a more formal, civil, and slower method in my opinion. I would rather them keep guessing what our next move is instead of confronting them. Just my thoughts.

Brian

Brian T. Bates, PE
Associate
Woolpert, Inc.
2000 Center Point Drive, suite 2200
Columbia, SC 29210
803.214.5884

From: THOMAS, RICHARD W JR [mailto:RWTHOMAS@scana.com]
Sent: Thursday, November 06, 2008 3:32 PM
To: Daniel B. Hill
Cc: Bates, Brian
Subject: Roper Property - Meeting next Friday, Nov. 14th

Brian and Danny,

Can you meet next Friday afternoon (November 14th) in Joel Lourie's Conference room at the Grassetto Bldg with DEHEC to review the revised set of BP Barber plans for the Roper Property? Estimated time of meeting 2:30 pm.....may change to 3:00.
Rick T.

6/15/2009

SCANA - 0698

0314

From: THOMAS, RICHARD W JR
Sent: Thursday, November 06, 2008 4:30 PM
To: Bates, Brian
Subject: RE: Roper Property - Meeting next Friday, Nov. 14th
Categories: Green Category

I agree with you...I will let Joel know that You Danny and I can be there.
RT

From: Bates, Brian [mailto:Brian.Bates@Woolpert.com]
Sent: Thursday, November 06, 2008 4:28 PM
To: THOMAS, RICHARD W JR
Subject: RE: Roper Property - Meeting next Friday, Nov. 14th

Yes I can attend a meeting at that time. As for your phone message about BP Barber, I don't care if they are there, but letting them know our position on their design (assuming we find flaws) that quickly will just expedite their response. I would think that every day that this thing is not resolved is another day it isn't being built. Going through the system is a more formal, civil, and slower method in my opinion. I would rather them keep guessing what our next move is instead of confronting them. Just my thoughts.

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803.214.5884

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Sent: Thursday, November 06, 2008 3:32 PM
To: Daniel B. Hill
Cc: Bates, Brian
Subject: Roper Property - Meeting next Friday, Nov. 14th

Brian and Danny,
Can you meet next Friday afternoon (November 14th) in Joel Lourie's Conference room at the Gressette Bldg with DEHEC to review the revised set of BP Barber plans for the Roper Property? Estimated time of meeting 2:30 pm.....may change to 3:00.
Rick T.

6/15/2009

SCANA - 0699

0316

From: THOMAS, RICHARD W JR
Sent: Thursday, November 06, 2008 4:34 PM
To: JOEL LOURIE
Subject: Roper Property - Meeting next Friday, Nov. 14th
Categories: Green Category

Joel,

Danny, Brian and I will be there at 3:00 on the 14th....See Brian's comments below about BP Barber and developer. He has a good point, Rick T

From: Bates, Brian [mailto:Brian.Bates@Woolpert.com]
Sent: Thursday, November 06, 2008 4:28 PM
To: THOMAS, RICHARD W JR
Subject: RE: Roper Property - Meeting next Friday, Nov. 14th

Yes I can attend a meeting at that time. As for your phone message about BP Barber, I don't care if they are there, but letting them know our position on their design (assuming we find flaws) that quickly will just expedite their response. I would think that every day that this thing is not resolved is another day it isn't being built. Going through the system is a more formal, civil, and slower method in my opinion. I would rather them keep guessing what our next move is instead of confronting them. Just my thoughts.

Brian

Brian T. Bates, PE
Associate
Woolpert, Inc.
2000 Center Point Drive, suite 2200
Columbia, SC 29210
803.214.5884

SCANA - 0701

6/15/2009

0318

From: THOMAS, RICHARD W JR
Sent: Friday, November 07, 2008 11:05 AM
To: JOEL LOURIE
Subject: Friday - Nov. 14th Meeting Confirmed
Categories: Green Category

Joel,

Danny and Brian will be at the meeting with DEHEC next Friday at your office. I believe we should not invite BP Barber or the Developer. We may want to set up a separate meeting at a later date if they call....

Thanks,

Rick T

SCANA - 0704

6/15/2009

0320

From: LinBobJack@aol.com
Sent: Tuesday, December 30, 2008 12:21 PM
To: THOMAS, RICHARD W JR
Subject: (no subject)
Categories: Green Category
Attachments: DHEC ltr.wpd

I am forwarding the appeal letter to DHEC

One site keeps you connected to all your email: AOL Mail, Gmail, and Yahoo Mail. [Try it now.](#)

6/15/2009

SCANA - 0906

0322

December 30, 2008

HAND-DELIVERED

Clerk of the Board
SC DHEC
2600 Bull Street
Columbia, South Carolina 29201

Re: ROPER POND APARTMENTS, Richland County
File Number: 40-08-09-08
Site Location: 6837 North Trenholm Road
TMS# R16907-01-04

Dear Board Members of SC DHEC:

With regard to the reference project, we, the undersigned affected persons and/or entities, respectfully request that the Board review the DHEC staff decision to allow a stormwater permit to be issued for the project and to overturn the decision. Such a project is incompatible with the surrounding community and will have an adverse affect on the environment and , in particular, on Cary Lake which is in the already impaired Gills Creek Watershed. As you know, the watershed runs from Sesquicentennial State Park to the Congaree River through eight member districts of Richland County Council and is a wonderful resource that we all enjoy. Its streams, creeks and lakes provide habitat for fish and wildlife, support agriculture, provide drinking water and are the source of recreational opportunities such as fishing, boating and swimming for thousands of Midlands residents. Trash, sedimentation and pollution have contaminated large areas within the watershed . The reference project will only add to the problem.

Mr. Mundy, who signed the Notice of Intent for this project, has claimed for months that he is not the current owner of the land upon which the project is to be built. The current owner of record is Roper Pond, LLC of which Mr. Mundy was a member. According to Mr. Mundy, Roper Pond, LLC was sold to Capital Development, LLC in January of 2008, however, there is no deed of record to reflect a transfer of interest in the referenced real property. From what we know, the only member of Capital Development, LLC is Charles Mikel who lives in Greenville. This information may or may not have any impact on the decision to issue the stormwater permit, but we believe that the Board needs to be informed about who is truly responsible in this situation.

What is significant in this matter is that Mr. Mundy came to the Arcadia Lakes community in May of 2004 with a plan for the subject property to be developed with high end, single-family patio homes with a transition-type design which moved from patio homes to multi-family condominium units, along with a clubhouse and other recreational areas. The original plan

SCANA - 0907

for the property was based on a density of approximately four (4) units per acre. The new plan for development of the property presented in early August of this year by Mr. Mundy has no provision for a transition, and in fact has total of eight (8) multi-family apartment buildings with an overall density of approximately sixteen (16) units per acre. We feel that this drastic change in the plans for the property was misleading to adjacent property owners and the local neighborhood in general. Had we not been presented a plan four years ago that was basically satisfactory to the neighborhood, we never would have allowed the County rezoning process to move forward unchallenged. Essentially, the community was duped.

We appreciate your time and consideration of our appeal.

Respectfully submitted by the
undersigned,

From: THOMAS, RICHARD W JR
Sent: Thursday, October 02, 2008 9:28 AM
To: Bates, Brian
Subject: RE: Roper Planning Comm Revision #2
Categories: Green Category

Thank you again.....wish us luck Monday.....Joel has received a copy of a letter DEHEC sent to the developer telling him that they had pulled the developer's application and want him to provide all documentation for additional review. Is the first flush requirements a possible application killer that would require them to reapply. If we could get to that point, we may have chance to get them under the new rules if they approved before they have a chance to reapply.....RT

From: Bates, Brian [mailto:Brian.Bates@Woolpert.com]
Sent: Thursday, October 02, 2008 9:18 AM
To: THOMAS, RICHARD W JR
Subject: FW: Roper Planning Comm Revision #2

A couple of minor changes.

Brian T. Bates, PE
Associate
Woolpert, Inc.
2000 Center Point Drive, suite 2200
Columbia, SC 29210
803.214.5884

From: THOMAS, RICHARD W JR [mailto:RWTHOMAS@scana.com]
Sent: Wednesday, October 01, 2008 4:11 PM
To: Daniel B. Hill; linbobjack@aol.com; ccook@elliottlaw.us; Bates, Brian
Cc: rwthomasjr@sc.rr.com
Subject: Roper Planning Comm Revision #2

See attached revised, revision and mark up as needed....RT

SCANA - 0496

6/15/2009

0326

Turner, Felicia W.

From: THOMAS, RICHARD W JR
Sent: Wednesday, December 17, 2008 12:02 PM
To: Bates, Brian
Cc: rwthomasjr@sc.rr.com; LinBobJack@aol.com; Daniel B. Hill
Subject: Roper Pond Apartments

Categories: Green Category
Attachments: RoperPondApproval.PDF



RoperPondApproval
.PDF (395 KB)...

Brian,

We have until December 30 (15 days) to file an appeal to the DEHEC Board. We need to review the approval and the revised plans to determine if we have a reason or cause to appeal to the Board, and if not, can we still send in a blanket appeal to the DEHEC Board and delay the actual decision for 60 days. We need to get our hands on the plans.

Joel Lourie and John Hardee will be approaching SCDOT to hold up on their review until You, Me and Danny can meet with them. We (the three of us) need to express our engineering concerns about the outfall pipe size and condition, the potential overflow of Trenholm Road during storms and the use of the road R/W for the Roper Pond dam when the pond will be lowered to facilitate quantity collection/flow and damage to the road/Dam can take place due to the constant rising and falling of the water level in the pond and it's affect on the water flow net through the road subsurface and the potential damage to the Pond side of the road due to erosion and possible surface failure.

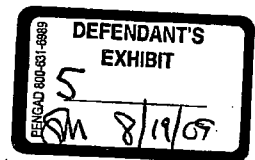
Let me know where you think we can go to delay and/or stop this project.

Thanks,
RT

Rick,
Attached is the approval letter for the Roper Pond Apartments project. The official time clock for appeals will begin tomorrow when the approval letter is mailed to the applicant. Page 4 of the attached document outlines the appeal procedures, including time clocks. If you have any additional questions, please let me know.

Thanks,

Jill C. Stewart, P.E.
Manager, Stormwater Permitting Section
Bureau of Water
(803) 898-0439





C. Earl Hunter, Commissioner

Promoting and protecting the health of the public and the environment

December 15, 2008

BOB MUNDY
ROPER POND LLC
1401 MAIN ST STE 650
COLUMBIA SC 29201

RE: ROPER POND APARTMENTS, Richland County
File number: 40-08-09-08

Dear Bob Mundy:

The Department of Health and Environmental Control (Department or DHEC) has approved the Stormwater Pollution Prevention Plan (SWPPP) for the referenced project on **December 15, 2008**. Based on your submission of the Notice of Intent (NOI) and in accordance with the NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities SCR100000 (2006 CGP), this project has been granted coverage under the 2006 CGP. This project's general permit coverage number is **SCR10J889**. The total disturbed area for this site is **9.6 acres**. This NPDES coverage expires on **12/15/2013**, 5 years from the date of issuance.

The inspections for this site must be performed by qualified personnel who meets the requirements list in Section 3.10.D of the 2006 CGP. Qualified personnel must be one of the following:

1. SWPPP preparer
2. Person under direct supervision of SWPPP preparer
3. Person who has been certified through a Construction Site Inspector Certification Course that has been approved by DHEC (see our website for a list of approved courses)
4. Person with registration equivalent of SWPPP preparer
5. Person under direct supervision of person with registration equivalent to SWPPP preparer

An as-built survey, signed and sealed by a S.C. Licensed Land Surveyor, should be submitted for the 1 structure(s) on this site. The survey(s) should show grades, contours, and depths for all structures and should include the elevations and dimensions of all outlet structures, including but not limited to pipes, orifices, risers, weirs, and emergency spillways. A statement signed by the project's S.C. Registered Engineer indicating that the structure(s) was installed and is operating as shown on approved plans and in approved calculations is required. If the elevations or dimensions of the structures listed above do not match those used in the approved plans, provide a certification statement signed by the project's S.C. Registered Engineer indicating that the structure, as built, will function as shown in approved calculations. A new analysis of the structure (routing) may be necessary. The as-built survey and/ or analysis must be accepted by the Department before a Notice of Termination (NOT) can be submitted.

"Because this project impacts waters of the U.S./ State, make sure you obtain all necessary permits and certifications from USACOE and SC DHEC 401 Water Quality Certification, Standards, i Section before land-disturbing activities begin in those areas.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
2600 Bull Street • Columbia, SC 29201 • Phone: (803) 898-3432 • www.scdhec.gov

SCANA - 0875

The 2006 CGP can be downloaded at the following website:
<http://www.scdhec.gov/environment/water/docs/finalcgp.pdf> or you may request a copy from us via email (stormwatercgp@dhec.sc.gov). You are responsible for ensuring your contractor(s) complies with the approved SWPPP and the minimum requirements of the 2006 CGP. Also, you are responsible for overall compliance with the Storm Water Management and Sediment Reduction Act of 1991 (1991 Act) and the Federal Clean Water Act (CWA).

You must notify this DHEC EQC Regional Office prior to starting any land-disturbing activity. The address and telephone number of the EQC office are as follows:

Columbia EQC Office
BUILDING 5 PO BOX 156
STATE PARK SC 29147-0156
803-896-0620

You should be aware that this approval is only applicable for the SWPPP that was submitted for this project. Any additional construction or land disturbing activity beyond the scope of the approved plans is not authorized. Any future work for this project not shown on the stamped, approved plans will require that you submit another site plan for review and approval. All major modifications require review and approval by the Department. Minor modifications to the approved SWPPP may be made by the SWPPP preparer and do not require review and approval by the Department; these changes should be signed and dated by the SWPPP preparer. If you have a question about whether a modification is major or minor, contact the Stormwater Permitting Section at (803) 898-4300.

Three (3) sets of stamped, approved plans are being provided to your engineer. A copy of the stamped, approved SWPPP (including a copy the 2006 CGP and signed co-permittee and contractor certifications), NOI, and CGP coverage letter from DHEC must be retained at the construction site (or accessible within 30 minutes during normal business hours) from the date of commencement of construction activities to the date of final stabilization. A copy of the stamped, approved SWPPP must be available at a central location on-site for the use of all those identified as having responsibilities under the SWPPP whenever they are on the construction site. If an on-site location is unavailable to store the SWPPP when no personnel are present, notice of the plan's location must be posted near the main entrance at the construction site.

All contractors who will conduct land-disturbing activities at the site must sign a certification statement as a co-permittee or as a contractor who is not a co-permittee. You are responsible for any contractor who is not a permittee. You are also responsible for listing all contractors in the SWPPP and for holding a pre-construction conference with each co-permittee and contractor who is not a co-permittee before they can conduct land-disturbing activity at the site.

The Department may conduct periodic inspections of your site. Any violations found during these inspections may result in enforcement action. Failure to comply with the approved SWPPP or the minimum requirements of the 2006 CGP, 1991 Act, or CWA may subject you to applicable penalties.

SCANA - 0876

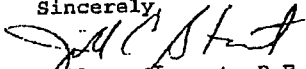
This NPDES coverage should be terminated by the permittee when one of the conditions listed in Section 5.1 of the 2006 CGP has been met. You must submit a Notice of Termination (NOT) to cancel your NPDES coverage under the 2006 CGP. Please see section 5.1 of the 2006 CGP for more information about termination of coverage.

You are responsible for obtaining any other federal, state, or local permit that may be required for this project. Please note we have not sent a copy of this letter to any county or city building official. You must send a copy of this letter to these agencies, if necessary.

Please see the enclosed "Notice of Appeal Procedure" document for information about the procedures for appealing this NPDES coverage. Also, see the enclosed document from the S.C. DHEC Compliance Assurance Division detailing some of the compliance requirements of the 2006 CGP.

If you have any questions or cannot access the referenced websites, please call me at 803-898-0439.

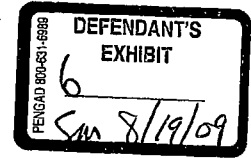
Sincerely,



Jill C. Stewart, P.E.
Stormwater Permitting Section

CC: James M Futter-BP BARBER & ASSOCIATES INC
Region 3, Columbia EQC Office

SCANA - 0877



TOWN COUNCIL
Richard W. Thomas, Jr., Mayor
Merrelle W. Harris
Bob Bishop
Rusty Onley
Michael N. Smith

October 2, 2008

TOWN CLERK
Christine W. Murphy

To: The Richland County Planning Commission

Subject: Resolution Adopted unanimously by the Mayor and Town Council of the Town of Arcadia Lakes at the duly called town council meeting of October 2, 2008, regarding the Roper Pond Development Plans submitted by the Planning Development Committee to the Commission.

RESOLUTION BY MAYOR AND COUNCIL OF THE TOWN OF
ARCADIA LAKES TO RICHLAND COUNTY
PLANNING COMMISSION

WHEREAS, the Mayor and Town Council of the Town of Arcadia Lakes, are informed and believe that the development proposal submitted by Estates Management, Inc. for the Roper Pond LLC (Property development for multifamily high density apartments) is substantially out of character and totally incongruous for the entire town, its neighborhoods, contiguous community and the intended zoning use as originally presented, and thereby contradicts the purposes of the Land Development ordinances of the county; and

WHEREAS, We the Mayor and Town Council of the Town of Arcadia Lakes hereby unanimously vote to express our opposition to this project as being in conflict with required law and regulations; and
WHEREAS, the Mayor and Town Council of The Town of Arcadia Lakes, acting for and on behalf of its citizens, respectfully requests that the Planning Commission of Richland County require an economic impact study be performed to determine the loss of property value to the homes in the adjacent Kaminer Station Subdivision, and homes directly affected across Trenholm Road and by adjacent nearby lakes, due to the proposed 204 apartments, including excessive paving and attendant building to be constructed in predominantly owner occupied neighborhoods and community of single family dwellings;
and

PET - 0166

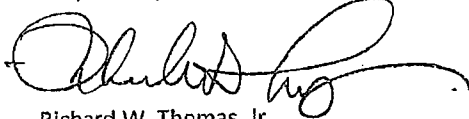
WHEREAS, because the Town of Arcadia Lakes is a co-permittee with Richland County as an NPDES Phase 1 permittee, and, that Roper Pond and the wetlands of this planned development property are a part of the Gills Creek Flood Plain, and, that because the State of South Carolina and the Environmental Protection Agency (EPA) has designated the Gills Creek Flood Plain as *impaired waters*, Richland County must provide and give the required due diligence and special attention over and above existing zoning standards to protect the wetlands of these impaired waters.

NOW THEREFORE, BE IT RESOLVED, that the foregoing premises are incorporated herein to this resolution and are directed to be presented to the Richland County Planning Commission by the Mayor of Town of Arcadia Lakes.

RESOLVED FURTHER, the MAYOR is authorized to present more detailed evidence to the Planning Commission at its October 6, 2008 meeting together with this resolution passed hereby.

ADOPTED UNANIMOUSLY by the Mayor and Council of the Town of Arcadia Lakes, South Carolina at its duly called monthly meeting October 2, 2008.

Respectfully Submitted this 2nd day of October, 2008.

A handwritten signature in black ink, appearing to read "Richard W. Thomas, Jr.", with a stylized flourish at the end.

Richard W. Thomas, Jr.

Mayor

PET - 0167

B

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW JUDGE DIVISION**

Town of Arcadia Lakes, Robert L. Jackson,
Linda Z. Jackson, Robert E. Williams, Barbara
S. Williams, Elizabeth M. Walker, Louis E.
Spradlin, Mary Helen Spradlin, Thomas Hutto
Utsey, Tony Sinclair, Aaron Small, Bette
Small, Gene F. Starr, M.D., Elaine J. Starr,
Sanford T. Marcus, Ruth L. Marcus, and
Steven Brown,

Petitioners,

vs.

South Carolina Department of Health and
Environmental Control and Roper Pond, LLC,

Respondents.

Docket No.: 09-ALC-07-0069-CC

**AFFIDAVIT OF W. THOMAS
LAVENDER, JR.**

PERSONALLY APPEARED BEFORE ME, W. Thomas Lavender, Jr., who, being duly sworn, swears and deposes that if he were called as a witness in the above-entitled action he would truthfully and accurately testify as follows:

1. I am an attorney licensed to practice law in the State of South Carolina and a member in the law firm of Nexsen Pruet, LLC (hereafter "the Firm"), 1230 Main Street, Columbia, South Carolina 29201. I graduated from the University of South Carolina School of Law in 1976. I am admitted to practice before all South Carolina Courts, the Federal Court of the District of South Carolina, the Fourth Circuit Courts of Appeals and the United States Supreme Court.
2. The Firm represents Respondent Roper Pond, LLC ("Roper Pond"), in the above-captioned action. I am familiar with this file and the number of hours spent and expenses incurred in the representation of Roper Pond in this matter.

3. The current hourly rates charged for each timekeeper on this file as follows:

<u>Attorneys</u>	<u>Hourly Rate</u>
W. Thomas Lavender, Jr.	\$370.00
Henry W. Brown	\$330.00
Joan W. Hartley	\$220.00

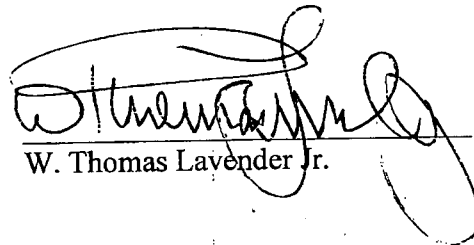
4. I have reviewed the timekeeping records maintained by Nexsen Pruet in the regular course of business in this file. Those records and reports reflect the individual entries by specific attorneys that describe each attorney's activity and the amount of time spent on each activity for the representation of Roper Pond.

5. In accordance with the time records of our office, which are maintained on a daily basis, I represent to this Court that the following time expenditures have necessarily been incurred in our representation of Roper Pond in this matter through March 19, 2010:

W. Thomas Lavender, Jr.	91.9 hours at \$370/hour	=	\$ 34,003.00
Henry W. Brown	13.8 hours at \$330/hour	=	\$ 4,554.00
Joan Hartley	291.7 hours at \$220/hour	=	\$ 64,174.00

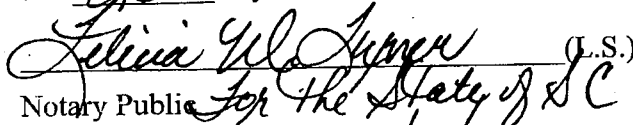
6. The total fees incurred by Respondent through March 19, 2010, in this matter were \$102,731.00. Additionally, costs incurred in connection with the Firm's representation of the Respondent total \$ 5,676.00.

FURTHER AFFIANT SAYETH NOT.


W. Thomas Lavender Jr.

SWORN and subscribed to before me

this 23 day of March, 2010


Notary Public *For the State of SC* (J.S.)

My commission expires 12/17/2018

C

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Town of Arcadia Lakes, Robert L. Jackson,
Linda Z. Jackson, Robert E. Williams, Barbara
S. Williams, Elizabeth M. Walker, Louis E.
Spradlin, Mary Helen Spradlin, Thomas Hutto
Utsey, Tony Sinclair, Aaron Small, Bette
Small, Gene F. Starr, M.D., Elaine J. Starr,
Sanford T. Marcus, Ruth L. Marcus, and
Steven Brown,

Petitioners,

vs.

South Carolina Department of Health and
Environmental Control and Roper Pond, LLC,

Respondents.

Docket No. 09-ALC-07-0069-CC

**AFFIDAVIT OF
CHARLES C. MICKEL**

PERSONALLY APPEARED BEFORE ME Charles C. Mickel, who, after being duly sworn, deposes and says that:

1. He is the managing member of Roper Pond, LLC ("Roper Pond"). He has knowledge of the financing for and costs associated with the Roper Pond property on Trenholm Road ("Property"). He also has knowledge of the costs associated with the litigation of this matter.

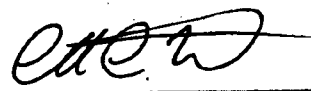
2. The total charge for B.P. Barber & Associates' services in relation to the litigation of this matter was \$22,415.

3. Roper Pond has incurred significant costs as a result of the delay in the planned development of the Property. The following is a summary of the costs of delay from the Petitioners' request for Board review of the Department's decision at issue in this matter on December 30, 2009, through the present. The cost of delay of the planned development of the

Property during this period totals \$510,430 :

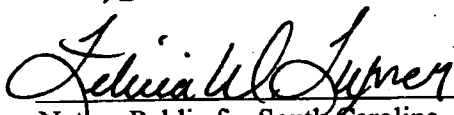
- (a) Interest on the financing of the project: \$234,430;
- (b) Permitting cost for Richland County permits which have expired: \$4,000;
- (c) Costs associated with compliance with new electrical code: \$234,000;
- (d) Overhead for management of project: \$38,000;

FURTHER AFFIANT SAYETH NOT.



Charles C. Mickel

SWORN and subscribed to before me
this 23 day of March, 2010.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 12/17/2018

Affidavit of Mundy was withdrawn
by Roper Pond, see Order dated
March 24, 2017, Record pp. 17-24

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 09-ALC-07-0069-CC

RECEIVED

MAR 01 2011

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson,
Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker,
Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey,
Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D.,
Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, ... Petitioners,

vs.

South Carolina Department of Health and Environmental Control
and Roper Pond, LLC, ... Respondents.

FINAL BRIEF OF APPELLANTS

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SOUTH CAROLINA ENVIRONMENTAL LAW
PROJECT

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Georgetown, South Carolina

February 28, 2011

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STATEMENT OF ISSUES ON APPEAL

- I. Did the ALJ Err in Concluding that DHEC Does Not Have Authority to Review Impacts Resulting from Dredging and Excavation of the Lily Pad Pond, Despite the Plain Language of Regulation 61-101 and the General Conditions of DHEC's Certification of Clean Water Act Nationwide Permits?**
- II. Did the ALJ Err in Concluding that DHEC Properly Granted Coverage Under the NPDES Stormwater General Permit to Roper Pond When DHEC Did Not Issue a 401 Water Quality Certification Certifying that the Project Complied with DHEC's Nationwide Permit Certification Conditions and Did Not Review the Water Quality Impacts Resulting from Dredging the Lily Pad Pond?**
- III. Did the ALJ Err in Concluding that the Appellants Do Not Have Standing, Despite Testimony that the Appellants Enjoy Viewing the Lily Pad Pond, Which Would be Altered by the Proposed Project; that the Appellants Swim and Boat in Cary Lake and are Concerned About Lower Water Quality Resulting from the Proposed Project; and that the Town Has a Responsibility for Managing Stormwater and the Environmental Quality of the Town?**

STATEMENT OF THE CASE

This case arises from an appeal of the Department of Health and Environmental Control's ("DHEC") decision to issue a storm water permit and thereby grant coverage under the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") General Permit to Roper Pond, LLC. Roper Pond, LLC, requested the storm water permit and coverage under the NPDES permit in connection with the development of a high density apartment complex on a tract of land consisting of 12.75 acres, including 1.8 acres of wetlands, lying immediately adjacent to the Town of Arcadia Lakes in Richland County, South Carolina. The Petitioners challenge the issuance of the storm water permit and corresponding coverage under the NPDES permit based on Roper Pond, LLC's failure to meet all of the requirements for coverage under the NPDES permit program, including its failure to obtain the appropriate State approvals for dredging and excavation of an on-site pond.

A hearing was conducted on September 4-5, 2009, in the Administrative Law Court. Administrative Law Judge John D. McLeod issued a final order and decision on January 21, 2010, affirming the DHEC decision and ruling that the Appellants lacked standing to maintain this action. The Petitioners filed a Motion to Reconsider and For Stay on February 1, 2010. A hearing on the motion was held on March 23, 2010. Also on March 23, 2010, the Administrative Law Court issued an Order for Temporary Stay pending a decision on the Motion to Reconsider. On April 1, 2010, the Administrative Law Court issued an Order Denying Motion for Reconsideration and For Stay.

On April 20, 2010, Petitioners filed a Notice of Appeal in this Court.

ARGUMENT

Overview of the Case

Roper Pond, LLC's Proposed Residential Development Project

Roper Pond, LLC, owns 12.75 acres of real property, including 1.8 acres of wetlands and waters identified by the U.S. Army Corps of Engineers as falling under the jurisdiction of the Clean Water Act. (R. pp. 534-541; 542-548; 555-562). A majority of the jurisdictional area consists of a pond, known as the "lily pad pond" or "Roper Pond," that is depicted on plans submitted by Roper Pond, LLC. (R. pp. 534-541; 542-548; 555-562). The Roper Pond property and the lily pad pond are located on Trenholm Road and are adjacent to the Town of Arcadia Lakes. The pond is visible from Trenholm Road when entering the Town of Arcadia Lakes and is covered in lily pads. (R. pp. 931-35). The pond drains through a pipe under Trenholm Road into Cary Lake, a portion of which lies within the Town of Arcadia Lakes. (R. pp. 534-541; 542-548; 555-562).

As part of its proposed development, Roper Pond, LLC plans to fill 0.075 acres of wetlands for a road crossing and a building pad. (R. pp. 555-562). Roper Pond, LLC, also plans to dredge and excavate all of the lily pad pond, which is the majority of the remaining 1.8 acres of federally jurisdictional wetlands on the property. Roper Pond, LLC, proposes to use the lily pad pond as a component of its storm water plans. The pond will be used as a water control structure, namely a retention pond. (R. pp. 580-581).

Summary of Permitting Requirements for the Proposed Residential Development

In order to undertake the proposed multi-family residential construction activities on the 12.75 acre tract, Roper Pond, LLC, has to obtain a number of approvals from the

S.C. Department of Health and Environmental Control ("DHEC") and the U.S. Army Corps of Engineers. One of those approvals is a DHEC stormwater permit for land-disturbing activities in connection with the proposed residential development.¹ See 24 S.C. Code Ann. Regs. § 61-9.122.26(c). Regulation 61-9.122.28(a)(2) authorizes DHEC to issue general stormwater permits for discharges for categories of stormwater sources. On August 1, 2006, DHEC issued such a permit, Permit No. SCR100000, entitled "NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities" pursuant to Regulation 61-9.122.28(a)(2). To have a valid stormwater permit, the residential construction activities proposed by Roper Pond, LLC, require approval under this NPDES General Permit for Storm Water (hereinafter "NPDES General Permit").

To obtain approval under this NPDES General Permit, Roper Pond, LLC submitted a Notice of Intent for Stormwater Discharges seeking coverage for its land-disturbing activities under the NPDES General Permit. (R. pp. 549-550) The Notice of

¹ Prior to conducting any land-disturbing activities, an applicant must apply for a stormwater permit from DHEC. DHEC issues the stormwater permit in the form of granting coverage under the NPDES General Permit for Storm Water Discharges for Small and Large Construction Activities, in the case of Roper Pond, LLC's permit.

Section 402 of the Clean Water Act established the NPDES program and delegates authority to the States to operate the NPDES permit program. The NPDES program is the Clean Water Act's permitting system for both point and nonpoint sources of pollution. In this case, we are dealing with a permit for nonpoint source pollution in the form of stormwater and other runoff from the Roper Pond construction site.

Construction activities that disturb more than one acre are regulated under the NPDES stormwater permit program. S.C. Code Ann. Regs. § R.61-9.122.26(b)(15). Operators of these regulated construction sites are required to obtain coverage under a state NPDES permit, also called a stormwater permit. S.C. Code Ann. Regs. § R.61-9.122.26(a)(9)(B). This portion of the Clean Water Act was enacted based on recognition that stormwater runoff had become a primary source of water pollution in many areas of the country. The purpose of the NPDES stormwater permit requirement is to ensure that operators of construction sites implement stormwater pollution control measures.

Intent requires the applicant to identify all jurisdictional wetlands in the project area, whether there will be any impacts to those wetlands from the project, and the amount of wetlands proposed to be impacted.

Critically, the NPDES General Permit requires an applicant to obtain any required wetlands permit before DHEC will grant coverage under the NPDES General Permit.

The wetlands permit is a Clean Water Act §404 permit from the U.S. Army Corps of Engineers ("Corp"), which is triggered if an applicant proposes to place fill material in wetlands that are waters of the U.S. 33 U.S.C.A. § 1344(a). The Corps §404 permit in turn triggers the requirement for a §401 Water Quality Certification from DHEC that the §404 Permit is consistent with the §401 water quality regulations and State water quality standards. *See* 33 C.F.R. § 330.4 & S.C. Code Ann. Regs. 61-101, *et seq.* DHEC Regulations 61-101 govern the process and standards DHEC must follow and apply in its 401 certification review. S.C. Code Ann. Regulation 61-101.A.(2) states that "no Federal license or permit is to be granted until such [401 water quality] certification is obtained." *See also* 33 U.S.C. § 1341.

The dredging and excavation of wetlands are not activities regulated under Section 404 of the Clean Water Act; however, DHEC's review authority over dredging and excavating wetlands and waters of the State is not dependent on the Corps' jurisdiction. Rather, DHEC's review authority over waters of the State derives from the Pollution Control Act, the 401 water quality certification regulations at R. 61-101 and the water quality standards at R. 61-68.

The Clean Water Act also authorizes categories of general permits under § 404

called Nationwide Permits for certain activities deemed to have minimal adverse environmental impacts. 33 U.S.C.A. § 1344(e)(1). If a proposed project falls under one of these NWPs, the Corps will not undertake an individual 404 review. Specific to this case, the U.S. Army Corps of Engineers issued Nationwide Permits #29 and #39 on March 12, 2007. 72 FR 11092 (11123). Nationwide Permit #29 applies to residential developments and Nationwide Permit #39 applies to commercial and institutional developments.

DHEC issued 401 water quality certifications for Nationwide Permits #29 and #39 on May 11, 2007, along with a number of other NWPs not relevant to this appeal. The certifications included general conditions that must be met in order for the DHEC §401 water quality certification to be valid and the Nationwide Permits to be effective. (R. p. 563; S.C. Code Ann. Reg. 61-101.A.). The general conditions of that certification require DHEC to consider the “over proposed project,” including “all land within the project boundary under single ownership. It is not interpreted to mean only the land area directly impacted by the NWP.” (R. p. 563). The general conditions say that “Impacts to . . . adjacent waterbodies or wetlands resulting from the activity will be considered during the review of these actions.” (R. p. 563).

In summary, for the Corps 404 permit to be issued and effective, the project must have a DHEC 401 water quality certification. In this case, where there is a Clean Water Act Section 404 Nationwide Permit for which DHEC has issued a 401 water quality certification with conditions, DHEC must ensure that the conditions of its 401 water quality certification have been met. (R. p. 563). In other words, DHEC must

affirmatively certify that the project meets its Section 401 water quality certification general conditions in order for the project to have an approved and effective Section 404 Nationwide Permit.

Again, the NPDES General Permit conditions expressly require that any Corps of Engineers 404 permit required under the Clean Water Act be issued and effective prior to DHEC granting coverage under the NPDES General Permit. (R. p. 487). Section 2.1(C) of the NPDES General Permit provides as follows: "If a US Army Corps of Engineers' 404 Permit is required by Section 404 of the CWA for permanent or temporary storm water control structures, DHEC may not grant coverage under this [General Construction Permit] until the 404 Permit has been issued and is effective."² (R. p. 487)

Neither a §404 NWP nor a §401 water quality certification of the NWP were properly issued to Roper Pond, LLC before DHEC approval under the NPDES General Permit.

There are 1.8 acres of wetlands and waters of the United States on the subject property. As part of its development plans, Roper Pond, LLC, proposed to fill 0.075 acres of these wetlands and to dredge and excavate the lily pad pond, which composes the majority of the 1.8 acres of wetlands. Roper Pond, LLC, sought approval to fill those 0.075 acres of wetlands under the Corps' 404 NWP program; however, Roper Pond, LLC, did not disclose the dredging and excavation of the pond in its joint application and

2

On June 30, 2006, the Department published a guidance document for the NPDES General Permit to be issued on August 1, 2006 ("Guidance Document"). (R. pp. 564-572). The Guidance Document noted that the new NPDES General Permit included a provision regarding the requirement of a Clean Water Act Section 404 permit for the proposed activities prior to coverage under the NPDES General Permit.

did not seek or obtain approval for the dredging and excavation activities from DHEC.

In this case, DHEC did not conduct a review to ensure that its 401 certification conditions of the Nationwide Permit had been met, failing to issue a 401 water quality certification of the Nationwide Permit. And DHEC granted coverage under the NPDES General Permit despite the fact that Roper Pond, LLC, did not have that certification. Thus Roper Pond, LLC, does not have the required water quality certification, which is a prerequisite to obtaining coverage under the NPDES General Permit.

The ALJ compounded DHEC's error by upholding the DHEC decision; by concluding that DHEC has no authority to consider water quality impacts resulting from the dredging and excavation of the pond; and by concluding that the Appellants lack standing.

DHEC's Review of the Proposed Project

Roper Pond, LLC, submitted two applications – one to DHEC's storm water department seeking coverage under the NPDES General Permit, and one to the Corps and to DHEC's 401 water quality certification department seeking approvals under a Nationwide Permit and certification. Both of these applications were required because Roper Pond, LLC, needed both a stormwater permit and a 404 wetlands permit and certification.

Jill Stewart is the manager of the Stormwater Permitting Section at the S.C. Department of Health and Environmental Control ("DHEC"). She received the application from Roper Pond, LLC, seeking coverage under the NPDES General Permit in connection with a multi-family residential development. (R. pp. 161; 549-550).

Roper Pond, LLC's consultant, George Whatley of BP Barber, submitted Roper Pond, LLC's other application to the Corps and DHEC seeking approval of wetland impacts in the form of a Corps 404 Nationwide Permit and DHEC 401 certification of that NWP. The application identified 0.075 acres of wetland impacts. (R. pp. 553-554). Chuck Hightower in DHEC's 401 water quality certification program reviewed this 404/401 application. The application did not identify any impacts to the lily pad pond. (R. pp. 553-554). The application did not identify any dredging or excavation on the subject property. (R. pp. 553-554). In fact, at the time that George Whatley submitted the 404/401 application, he was not even aware that the applicant intended to excavate the pond. (R. p. 438). When he filled out the application, Whatley left the line identifying the area to be dredged or excavated blank, even though he admits that under the developer's current plan there will be dredging. (R. pp. 553-554; 467-468).

Roper Pond, LLC, eventually submitted engineered plans to DHEC showing that, in fact, it intended to make alterations to the pond. (R. p. 164). The alterations include excavation and dredging of the lily pad pond and lowering the water level and outfall structure to allow use of the pond for stormwater detention. (R. pp. 580-581).

In issuing a stormwater permit, Ms. Stewart did not evaluate impacts to the pond or water quality resulting from the excavation. (R. p. 167). She said she just assumed the project "was in compliance with the standards and therefore have no impact on the pond." (R. p. 167, lines 12-14). Ms. Stewart was operating under the assumption that DHEC's 401 water quality certification section had issued a water quality certification, based on a letter she received from the 401 section. (R. p. 165). Further, she specifically

asked Roper Pond, LLC, whether impacts to the lily pad pond were covered under the 401 section's approval, and they told her that impacts to the pond were included in the 401 certification approval. (R. pp. 551-552; R. p. 165). When Ms. Stewart asked Roper Pond's consultant, BP Barber, whether excavation of the pond was covered under Nationwide Permit 39, the wetlands consultant "stated that lowering of the water surface elevation is included and covered under the Nationwide Permit 39." (R. pp. 166-167; 551-552; 921). Rather than determining whether there was an effective Corps permit with 401 water quality certification, Ms. Stewart relied on statements made by the applicant that there was full approval and improperly issued coverage under the NPDES General Permit. (R. p. 178).

Ms. Stewart admitted that she does not know whether excavation of the pond will cause sedimentation. (R. p. 227). She does not know whether any Best Management Practices will be used during excavation of the pond. (R. p. 227). She does not know what kind of discharge structure will be used during pond excavation. (R. p. 227). She does not know what will happen with the material dredged from the pond. (R. pp. 227-228). She does not know how excavation of the pond will affect the aquatic fauna and flora in the pond. (R. p. 228). And she does not know how excavation of the pond will affect the wetlands upstream from the pond. (R. p. 228).

Charles Hightower has been the section manager of DHEC's 401 water quality certification program since November, 2007. (R. pp. 234-235). Mr. Hightower reviewed the Roper Pond, LLC's joint state and federal application to impact waters of the U.S seeking a 404 permit and 401 certification. He said that Roper Pond, LLC, applied for

permission only to fill in 0.075 acres of federally jurisdictional wetlands. (R. p. 235; R. pp. 553-554). It did not ask for permission to impact any other wetlands or waters. (R. pp. 553-554).

As part of this 404 wetlands permit application, the Corps also requires a Pre-Construction Notification ("PCN") as a condition of Nationwide Permit #29 and #39. Based on the PCN submitted by Roper Pond, LLC, the Army Corps of Engineers issued a letter that the project meets the Corps' terms and conditions of NWP # 39. (R. pp. 237; 555-562). The drawings attached to the Corps' PCN response letter depict only impacts to the 0.075 acres of wetlands proposed to be filled. (R. pp. 555-562). DHEC received the PCN and the Corps letter and then issued its water quality certification letter for NWP #39. The water quality certification letter represents DHEC's conclusion that the project meets the general conditions of its 401 water quality certification of the NWP. Impacts to the 0.075 acres of wetlands were the only impacts that DHEC reviewed in making its certification decision on NWP #39. (R. p. 244). DHEC did not consider impacts that would result from excavation of the lily pad pond. (R. p. 254).

The Corps initially approved the Roper Pond, LLC project under the wrong Nationwide Permit. Nationwide Permit #39 applies to commercial and institutional developments. (R. p. 247). Because the Roper Pond proposal is neither a commercial nor an institutional development, NWP #39 does not apply. Later, at Roper Pond, LLC's request, the Corps issued a letter approving the project under NWP #29, which covers residential developments. (R. p. 248). Although DHEC received a copy of the NWP #29 approval, DHEC did not issue a 401 certification authorization letter for the Roper Pond

project under Corps Nationwide Permit #29. (R. pp. 248; 260). Mr. Hightower said that DHEC has to make a “specific determination” to insure that a project meets the 401 certification before it issues a certification letter. (R. p. 609). When asked why DHEC did not issue a certification letter on the NWP #29 approval, Hightower said that “we should have sent another [certification] letter,” but that “we did not do it.” (R. p. 262, lines 8-11).

In short, DHEC issued a flawed certification for Roper Pond, LLC’s first NWP, which the Corps approved in error. When the Corps corrected its error and approved the project under the applicable NWP, DHEC issued no certification at all.

In its letter responding to Roper Pond, LLC’s Pre-construction Notification letter, the Corps stated, in bold print, that **“Prior to beginning the authorized work, the permittee must obtain and provide the Corps with a copy of all appropriate state certifications and/or authorizations, i.e., 401 water quality certifications . . . If the permittee fails to obtain his necessary state certifications and/or authorizations prior to beginning work, this would be considered a willful and knowing violation of the Clean Water Act.”** (R. pp. 555-562). Because DHEC did not issue a certification letter stating that the project meets its conditions to qualify for coverage under NWP #29, Roper Pond, LLC did not obtain and provide the Corps with such certification.

Mr. Whatley said that Roper Pond LLC, had received a letter from DHEC notifying it that the agency had reviewed the project and issued a certification for NWP #39, in compliance with the Corps notification requirement. (R. p. 474). But at the time of that review, Mr. Whatley had not notified DHEC that the applicant was proposing to

dredge or excavate the pond. (R. p. 474). He only notified the Corps of the dredging and excavation at some point after the application was submitted. (R. p. 474).

Mr. Hightower admitted that DHEC's 401 water quality certification section never reviewed nor authorized impacts to the lily pad pond. (R. p. 263, lines 5-13).

Water Quality Impacts Resulting from Excavation of the Lily Pad Pond

The Petitioners asked Seth Reice, a Professor of Ecology and Biology at the University of North Carolina, to assess the impacts on water quality and the pond. Dr. Reice testified as an expert in aquatic ecology. (R. pp. 304-305). He made a site visit on June 3, 2009. (R. p. 307). He looked at biodiversity, which is a measure of the distribution and variety of organisms, and the ecological health of the pond. He observed that the pond is filled with water lilies that are aquatic plants growing about three to four feet above the bottom of the pond. (R. p. 309). He took water samples and bottom samples to look at water chemistry and aquatic organisms living in the pond. (R. p. 310). He also caught some fish in the pond. (R. p. 310).

Dr. Reice examined the oxygen, salinity, conductivity, and pH of the pond water samples. (R. pp. 314-315). He said the water was very clear and clean with low pollutants. (R. p. 316). He also took the bottom samples back to his lab and identified the organisms he found living in the sediments. (R. pp. 313-314). He described the numerous organisms he identified and opined that "the presence of two species of fish and an assortment of benthic predators strongly implies that Roper Pond is a functioning aquatic system." (R. p. 319, lines 15-18). He said that "all the niches that you would expect in a pond are filled there now with the species that are present." (R. p. 353, lines

1-3). Looking at the entire system, Dr. Reice is convinced that the pond is a healthy system. (R. p. 320).

Dr. Reice said that if the pond level is dropped through excavation, the margin of the pond will be exposed to air and most of the organisms that live there will die. (R. p. 323). Organisms living in the dredged material will all die. (R. p. 353). He said it would take about ten years for the community to reestablish after the major disturbance. (R. p. 324). But even after a community reestablishes, it will not be the same type of community that exists there now because the chance that the same species will colonize the pond is "quite small." (R. pp. 325-326).

Dr. Reice also said that the upstream wetlands will be impacted. The area is in equilibrium now, but once the pond level is dropped, the wetland area will decrease. (R. p. 323). The wetland size will decrease because once the water level is lowered, upstream water will flow more rapidly downstream, drying out and removing a large amount of the upstream wetland. (R. pp. 323-324).

None of this testimony was contradicted.

In addition to the physical and chemical qualities of the water that he measured, Dr. Reice said that in order to assess the impacts of altering the pond, there are other factors that need to be evaluated. He said one would want to know the history of the pond, how it was formed, how long it has been there, the rate of sediment accumulation, how the excavation will be conducted and the extent of the excavation, as well as the nutrient loads coming into the pond. (R. p. 359-361). DHEC did not assess impacts using any of these factors.

DHEC's failure to perform the proper review in accordance with its 401 certification and the applicable regulations, and failure to issue any approval of the impacts of the excavation, means that DHEC has not issued a certification of Roper Pond's NWP # 29. Without a proper certification, Roper Pond lacks the required state approval that is an express prerequisite to the storm water permit and coverage under the NPDES General Permit.

Moreover, the testimony of Appellants' expert about impacts on the aquatic life in the pond and negative impacts on the wetlands above the pond, is uncontroverted. Given this testimony, the ALC erred in concluding that the full scope of the work proposed by Roper Pond, LLC, is in compliance with the 401 Water Quality Certification and Water Quality Standards regulations.

Summary of Argument

The issues in this appeal are 1) whether DHEC properly granted Roper Pond, LLC coverage under the NPDES General Permit for Stormwater Discharges, 2) whether Roper Pond, LLC has valid approvals for the excavation and dredging of an on-site lily pad pond and 3) whether the Appellants have standing to maintain this action.

The Administrative Law Judge's Order represents a fundamental misapplication of the law. Rather than applying the plain language of South Carolina's legal requirements pursuant to the NPDES General Permit, the 401 Water Quality Certification Regulations and the Water Quality Standards, the Order expounds on federal requirements under the Clean Water Act. The ALJ uses this long-winded discussion of federal requirements to arrive at the conclusion that the State has no regulatory authority

to review impacts resulting from the dredging of the lily pad pond at issue in this appeal. This conclusion is erroneous because the ALJ: 1) overlooks the requirement for a valid and effective 404 permit, which include an affirmative certification that the project meets DHEC's 401 certification conditions, in order to qualify for coverage under the NPDES General Permit and 2) ignores DHEC's general conditions of its NWP certification, which require DHEC to consider the impacts to all wetlands resulting from the project, including the dredging and excavation of the lily pad pond.

The ALJ justifies elimination of DHEC review of impacts to wetlands and water quality, specifically the dredging of the lily pad pond, based on lay testimony about legal requirements, rather than upon the plain language of the applicable regulations. The ALJ's conclusion on the state's regulatory authority is a misapplication of the regulations and permit conditions and is an error of law.

The Administrative Law Judge made three fundamental errors of law. First, he erred in concluding that a 401 Water Quality Certification is not required for impacts of the proposed project, in particular the dredging and excavation of the lily pad pond, despite the plain language of the regulations and the general conditions of DHEC's certification of federal Nationwide Permits. Second, the ALJ erred in concluding that the Roper Pond project qualified for coverage under the NPDES Stormwater General Permit, despite the plain language of the General Permit that requires an effective 404/401 Clean Water Act permit. Finally, the ALJ erred in concluding that the Appellants lack standing to maintain this action.

I. The ALJ Erred in Ruling that DHEC Has No Authority to Review Dredging and Excavation of the Lily Pad Pond

Both DHEC's 401 Water Quality Certification manager and its Storm Water section manager admitted that no one at DHEC examined the full scope of the impact of this project on waters and wetlands at the site, examined the impacts on the pond and the remaining wetlands above the pond, assessed the water quality impacts of the proposed excavation and alteration of the pond, assessed whether there were any feasible alternatives to the proposed impacts on the pond, or assessed whether the full project was in compliance with the Water Quality Certification regulations, R.61-101, the Water Quality Standards, R.61-68 or the general conditions of DHEC's water quality certification of the NWP. DHEC also admitted that neither the storm water permit nor the certification of NWP # 39 covered the impacts to the pond, and that no water quality certification was ever issued for NWP #29.

Yet DHEC's conditions of its NWP certification, along with the 401 water quality regulations, give it broad authority to consider all of the impact occurring on the project site as a result of the proposed activity and to assess impacts to all on-site wetlands and waters. The ALJ erred in concluding that DHEC had no such authority to review impacts to the lily pad pond.

A. The Project Goes Beyond What Is Authorized Under DHEC's Water Quality Certification of Clean Water Act Nationwide Permits

As it relates to this appeal, the State's 401 water quality regulations give the S.C. Department of Health and Environmental Control ("DHEC") broad authority to review impacts to wetlands and waters. DHEC utilizes these 401 water quality regulations to

issue certifications of federal Clean Water Act Section 404 permits issued by the U.S. Army Corps of Engineers ("Corps"). *See* S.C. Code Ann. Regs. 61-101.A.; *see also* 33 U.S.C. § 1341. Under the Clean Water Act, the Corps is authorized to issue Nationwide Permits, which act as general permits covering certain narrowly defined activities that categorically have minimal adverse environmental effects. 33 U.S.C. § 1344(e).

The Corps issued Nationwide Permits in 2007 covering certain categories of activities in wetlands or waters of the United States. The NWP's authorized only the very specific activities described in the NWP's and set forth specific requirements for authorization under those NWP's. In some of the NWP's, the Corps also included specific requirements for approval under an NWP. For NWP #29, the Corps required that the applicant provide a Pre-construction Notification ("PCN") to the Corps prior to undertaking any activity. DHEC's certification of NWP #29 was issued based on the express Corps condition that a PCN be provided. When the Corps receives a Pre-construction Notification of work authorized by NWP #29, the Corps in turn provides the PCN to DHEC, thus giving DHEC an opportunity to review the project prior to any construction activity. (R. pp. 281-282). The Corps' standard letter approving a project under NWP #29 includes a statement, in bold print, that no work can proceed until the applicant provides a copy of DHEC's certification. (R. p. 555).

When the Corps issued the Nationwide Permits, DHEC issued a public notice of its proposed decision to similarly categorically issue certifications of the activities authorized under the Nationwide Permits. (R. p. 249). Only those impacts that were specifically identified in the Corps NWP's were put on public notice. (R. p. 249).

In issuing its certification of the NWP, DHEC authorized certification under NWPs #29 and #29 only if certain general conditions are met. (R. p. 563)

DHEC issued 401 water quality certifications for some of the Nationwide Permits. (R. p. 244). When DHEC issued its 401 certifications, those certifications applied only to impacts specifically identified in the Nationwide Permits. (R. p. 244). Any alterations or impacts to wetlands beyond those defined in the NWPs were not covered by DHEC's 401 certifications of NWPs. (R. p. 603, lines 8-10). DHEC's certification of the NWPs only applies to activities in wetlands and waters specifically covered under that NWP, and any impacts not authorized under the NWP must receive an individual 401 water quality certification. (R. pp. 245-246). Indeed, the ALJ found that "an individual 404 permit and accompanying 401 Water Quality Certification is not required unless a proposed activity does not meet the conditions of the Nationwide Permit and the 401 Water Quality Certification issued by the Department for the Nationwide Permit." (R. p. 15, FF #27). Inherently, DHEC must conduct a review and affirmatively conclude that the conditions are either met or not.

The filling of 0.075 acres of wetlands is authorized by Corps Nationwide Permit # 29. However, the authorization is limited to the actual filling of wetlands and does not constitute approval of related impacts. In fact, when DHEC issued its certification of the Nationwide Permits, it included a condition that DHEC must consider "the overall project proposed or accomplished by a single owner/developer" and should not consider "only the land area directly impacted by each NWP." (R. p. 563, condition #1). Roper Pond is proposing impacts to wetlands and waters, mainly the excavation of the pond,

which are not covered by NWP # 29. These additional impacts are outside the scope of NWP #29; therefore these impacts require an individual 401 water quality certification that the project complies with Regulations 61-101 and 61-68.

In reviewing and certifying Nationwide Permit # 29 in 2007, DHEC could only assess the impacts of the small amount of wetland fill allowed under that NWP. The certification of NWP # 29 in 2007 was based on the premise that a Pre-construction Notification would be provided by each applicant that would inform DHEC of the broader impacts of a project, if any. The general conditions of DHEC's 2007 certification also demonstrate that a broader review of NWP projects would be necessary. For instance, DHEC's General Conditions require the applicant to "demonstrate that impacts to wetlands have been avoided; unavoidable impacts to wetland areas have been minimized, and provide suitable compensation for any unavoidable wetland impacts." (R. p. 573, #5) These general conditions also require the delineation of all wetlands on the site, and require DHEC to evaluate the complete project – "the overall project proposed or accomplished by a single owner/developer" – and "it is not interpreted to mean only the land area directly impacted by each NWP request." (R. p. 573, #1).

B. The Project Does Not Comply with the General Conditions Under DHEC's Certification of NWPs

When DHEC issued its 401 water quality certifications for the Nationwide Permits, it included General Conditions applicable to all NWPs that were being certified. (R. p 573). In other words, even if a project meets the conditions of a NWP, it must also satisfy these general conditions to receive 401 water quality certification. The first general condition requires DHEC in considering certification to review the "overall

project” proposed by an applicant and includes “all land within the project boundary . . . It is not interpreted to mean only the land area directly impacted by each NWP request.” (R. p. 573, para. 1, emphasis added). Thus DHEC must also consider impacts to “adjacent waterbodies or wetlands resulting from an activity” that go beyond what is authorized under the NWP. (Id.) Consideration of all land within the project area that is directly impacted by the project includes impacts caused by filling wetlands and other direct impacts such as dredging and excavating the lily pad pond.

DHEC’s certification of the activities authorized under the NWPs and its general conditions applicable to the NWPs are consistent with the manner in which DHEC reviews individual Corps 404 permits. (R. pp. 251-252). When DHEC conducts an individual certification review of an individual Corps 404 permit, it looks at all water quality impacts, including water quality impacts beyond those identified in the 404 permit, such as excavation and dredging.³ (R. pp. 251-252).

DHEC’s General Conditions require the applicant to “demonstrate that impacts to wetlands have been avoided; unavoidable impacts to wetland areas have been minimized, and provide suitable compensation for any unavoidable wetland impacts.” (R. p. 573). This provision does not limit review to only wetlands being filled, but to wetlands that will be impacted. The lily pad pond is a wetland that Roper Pond, LLC, is proposing to impact through excavation. Roper Pond, LLC made no demonstration and DHEC has done no review to establish that impacts to the lily pad pond have been avoided,

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While the Army Corps of Engineers does not regulate the excavation and dredging of wetlands as proposed under this project, DHEC’s authority stems from the Pollution Control Act and Regulations 61-101 and 61-18, which the agency has historically employed in its evaluation of activities not regulated by the Corps. (R. pp. 251-252).

minimized and/or compensated for, in violation of the DHEC's General Conditions under its 401 certification of the NWP.

The Appellants have never suggested that Roper Pond, LLC needs a Corps 404 permit to dredge the lily pad pond, as the ALC concluded. (R. p. 28). Rather, the Appellants contend that to have a valid Corps 404 permit Roper Pond, LLC must have a valid 401 Water Quality Certification of that Corps permit, and because this project does not meet the General Conditions for DHEC's 401 Water Quality Certification, and the project goes beyond what is authorized under the NWP, Roper Pond, LLC does not have a valid 404 permit and does not qualify for coverage under the NPDES General Permit.

The ALC erred by concluding that there is no legal basis to require 401 Water Quality Certification for excavation of the lily pad pond. (R. p. 30). The ALC looks to the NPDES General permit and the Stormwater Regulations for this conclusion, yet fails to apply the conditions of the NPDES General Permit or the conditions of the 401 water quality certification of the NWPs.

The ALJ erred in attempting to limit DHEC's scope of review under the water quality certification regulations, despite the plain language of the regulations and the conditions of the certification of the NWP, which clearly give DHEC authority to review all impacts of the projects and does not limit impacts to the Corps' jurisdiction over only the filling activities.

C. DHEC Never Certified that the Proposed Project Meets Its Conditions for Water Quality Certification of Nationwide Permit #29

There is no question that excavation of the lily pad pond is not included in the NWP or DHEC's certification of that NWP. There is no question that DHEC did not

consider the “overall” project and “all land within the project boundary,” instead limiting its evaluation to only the land directly impacted by the NWP, in contravention to its 401 Certification General Conditions. Yet the ALJ concluded that Roper Pond, LLC does have an effective 404 permit for the project, despite his finding that an individual water quality certification is required if the activity does not meet the general conditions of DHEC’s 2007 certification of the NWPs. (R. p. 25) (“an individual 404 permit and accompanying 401 Water Quality Certification is not required unless a proposed activity does not meet the conditions of the Nationwide Permit and the 401 Water Quality Certification issued by the Department for the Nationwide Permit.”)

To implement this requirement for individual certification, DHEC must either affirmatively certify that a project meets its General Conditions to qualify for coverage under a Nationwide Permit or find that it does not meet the general conditions, and thus requires individual review. In fact, the Corps requires the permittee to provide a copy of the 401 certification as part of its approval process. (R. p. 555). Chuck Hightower said that DHEC issued a 401 water quality certification letter for Nationwide #39. He said he should have issued a 401 water quality certification letter for NWP #29, but did not. Thus, there is no DHEC 401 water quality certification of Roper Pond LLC’s Nationwide Permit, rendering the Corps 404 permit ineffective and the project fails to meet the conditions necessary for coverage under the NPDES General Permit.

D. DHEC Did Not Conduct the Required Review for Compliance with the Water Quality Regulations at R. 61-101 and R. 61-68

The ALJ erred in concluding that there is no statutory or regulatory basis for the Appellants claim that a 401 water quality certification is required for the dredging and

excavation of the lily pad pond. And DHEC erred in failing to review the project for compliance with its 401 Certification General Conditions, Regulations 61-68 and 61-101 and to issue a certification of the NWP.

The ALJ erroneously applied *Responsible Economic Development v. S.C. Dept. of Health and Environmental Control*, 371 S.C. 547, 641 S.E.2d 425 (2007), in concluding that DHEC cannot apply the water quality standards of Regulations 61-68 or the water quality certification regulations of Regulation 61-101 to this project. In that case, the Court said that the water quality standards and classifications regulations promulgated pursuant to the Pollution Control Act ("PCA") could not be applied to a stormwater permit because the Stormwater Regulations and the PCA Regulations do not reference each other.

In this case, the NPDES General Permit conditions require that all Clean Water Act 404 permits and accompanying 401 water quality certification be issued and effective. And in this case, the need for a CWA 404 permit and 401 water quality certification, which are required for impacts to on-site waters, are what trigger the applicability of Regulations 61-68 and 61-101.

As discussed above, at the time that DHEC issued its certification of the NWPs it was only authorizing the limited impacts permitted under the NWPs, nothing more. The dredging and excavation in this project go beyond the limited impacts of NWP #29 and #39, and the General Conditions established by DHEC specifically authorize DHEC to look at impacts to all of the land within the project boundary and all impacts to wetlands. That review was not done despite the express language of the General Conditions and the

regulations.

The DHEC Water Quality Certification Regulations, S.C. Code Ann. Reg. 61-101, expressly require that DHEC, prior to issuance of a certification, must consider: “whether there are feasible alternatives to the activity; . . . all potential water quality impacts of the project, both direct and indirect, over the life of the project, including physical, chemical, and biological impacts, including including: (1) impact on existing and classified water uses; (2) physical, chemical, and biological impacts, including cumulative impacts; (3) the effect on circulation patterns and water movement; (4) the cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others.” S.C. Code Ann. Reg. 61-101.F.(3).

Regulation 61-101.C. requires Roper Pond, LLC, to give a “description of all proposed activities reasonably associated with the proposed permitted project either directly or indirectly, . . . that relate to water quality considerations.” S.C. Code Ann. Reg. 61-101.C.(1)(c). Roper Pond, LLC, did not give a description of the pond excavation, which relates to water quality considerations, in violation of this regulatory provision. Regulation 61-101.C. requires Roper Pond LLC, to give a “description of . . . any material to be dredged . . .” R. 61-101.C.(1)(d). Roper Pond, LLC, did not provide this description in violation of this regulatory provision. Regulation 61-101.C. requires Roper Pond LLC, to describe “the method of dredging or filling and specific plans for disposal and control of dredge spoils.” R. 61-101.C.(1)(e). Roper Pond LLC, did not describe how the lily pad pond would be dredged or where the spoils would go in its application in violation of this regulatory provision.

Under Regulation 61-101.F.(3), DHEC must consider whether there are feasible alternatives; all potential water quality impacts of the project, both direct and indirect, over the life of the project, including physical, chemical, and biological impacts, including cumulative impacts; and the cumulative impacts of the proposed activity. DHEC failed to consider whether there were feasible alternatives; the water quality impacts; and the cumulative impacts caused by excavation of the lily pad pond in violation of R. 61-101.F.(3). In fact, the uncontroverted evidence establishes that there will be significant biological and physical impacts to the lily pad pond, as described by Dr. Reice.

The ALJ made an error of law by failing to look to these applicable regulatory standards and concluding that there is no regulatory authority for assessing the impacts resulting from dredging and excavation of the lily pad pond.

A review to ensure that this project meets the water quality standards of R. 61-68 is required by Regulation 61-101, which provides that the "Department shall also certify that there is reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards regulations. No certification will be issued if such assurance is not provided." S.C. Code Ann. Reg. 61-101.A.4. The regulations authorize DHEC to issue certifications with "limitations, conditions, or monitoring requirements necessary to assure maintenance of classified or existing water uses and standards." S.C. Code Ann. Reg. 61-101.A.5.

As such, DHEC must make a determination of whether the applicable water quality standards of Regulation 61-68 have been met. The R. 61-68 water quality

standards require the maintenance and propagation of a balanced, indigenous aquatic community of fauna and flora. S.C. Code Ann. Reg. 61-68.A.(4). The water quality standards also require DHEC to “maintain and improve all surface waters to a level to provide for the survival and propagation of a balanced indigenous aquatic community of flora and fauna . . .” S.C. Code Ann. Reg. 61-68.A.(4). The only testimony relating to the aquatic community came from Dr. Seth Reice, who testified that the indigenous aquatic community that now exists in the lily pad pond would be lost. (R. 325). Yet DHEC never evaluated whether the pond excavation was consistent with those water quality standards. (R. pp. 169-170). And the ALJ concluded that DHEC did not have authority to evaluate that excavation.

The water quality standards also require that “existing water uses and the level of water quality necessary to protect these uses shall be maintained.” R. 61-68.D.(1). As discussed above, the existing uses would be lost if the lily pad pond were excavated, in violation of this regulatory provision.

The ALJ found that the “Department did not consider impacts of lowering the Pond in its review of Roper Pond, LCC’s SWPPP.” (R. p. 18, FF #36). The ALJ acknowledges that approval under a Nationwide Permit is appropriate only where the proposed activity meets the conditions of the Nationwide Permit and the 401 Water Quality Certification issued by the Department for the Nationwide Permit. (R. p. 15). Yet DHEC has admitted that the wetland impacts of the proposed development activity go beyond the limited amount of filling authorized by Nationwide Permit No. 29. The ALJ’s conclusion that the project has the required approvals, despite his finding that the

project must meet DHEC's conditions of its NWP certifications and DHEC's admission that the NWP only covers the 0.075 acres of fill, is an error of law.

The ALJ also concluded that the Corps verified that Roper Pond, LLC's activities were authorized under NWP 29, but that the "permittee must obtain and provide the Corps a copy of all appropriate state certifications and/or authorizations (i.e., 401 Water Quality Certification, Coastal Zone Management Consistency Determination, State Navigable Waters Permit)." (R. pp. 25-26). In this case, it is undisputed that the Nationwide Permit #29 does not cover dredging of the Lily Pad pond, that Roper Pond, LLC did not request approval for dredging of the pond, that DHEC did not review dredging of the pond, and that DHEC did not issue a certification of NWP #29. It is undisputed that the pond is a delineated wetland/water, and that it will be excavated as part of Roper Pond, LLC's proposed development.

The ALJ erred in concluding that Roper Pond, LLC has an effective 404 permit and 401 water quality certification for wetland impacts.

The ALJ concluded that DHEC had issued a 401 Water Quality Certification for NWP # 29. (R. p. 26). The ALJ erred in concluding that "Roper Pond has all state certifications and authorizations necessary for the proposed activities under Nationwide Permit 29." (R. p. 26). The undisputed testimony from Chuck Hightower is that he did not issue a certification letter.

The ALJ concluded that Pre-construction notification to DHEC is not required "as long as the permittee meets the conditions of the 401 Water Quality Certification for the Nationwide Permit." (R. p. 26). However, in this case, the permittee does not meet the

conditions of the 401 Water Quality Certification of the NWP's because the applicant is proposing impacts that go beyond what is authorized under the NWP and DHEC's certification of that NWP. The conditions specifically require DHEC to consider the impacts to "all land within the project boundary . . . It is not interpreted to mean only the land area directly impacted by each NWP request." (R. p. 573, para. 1, emphasis added).

According to Mr. Hightower, the 401 Water Quality Certification regulations are "pretty broad" and expressly require an assessment of all potential water quality impacts, both direct and indirect, over the life of the project, including cumulative impacts of the proposed activity. (R. p. 252; R. 61-101.F). Mr. Hightower admitted that DHEC is not "locked into" its NWP certification determination simply because part of a project falls under a Nationwide Permit (R. p. 277). He said that DHEC could have taken other steps, such as requiring public notice and an individual 401 review, if it wanted to. (R. p. 277). In this case, however, DHEC did not take any steps to assess the water quality impacts resulting from excavation of the pond. (R. p. 253). Mr. Hightower did not look at where the spoil disposal would go. (R. p. 254). He did not look at whether any Best Management Practices would be used during excavation. (R. p. 254). He did not look at how excavation was going to affect the aquatic life in the pond. (R. p. 254). He did not look at the impacts excavation would have on existing and classified water uses. (R. pp. 254-255). And he did not look at whether the excavation would have impacts on upstream wetlands. (R. p. 256).

Mr. Hightower testified that he believes that DHEC has no regulatory authority over the excavation of Roper Pond. Likewise, Mr. Whatley gave opinions related to the

U.S. Army Corps of Engineers' jurisdiction over dredging and excavation in waters of the U.S. This testimony was allowed at trial over Petitioners' objection. The testimony, however, is of no value in determining a conclusion of law – specifically, DHEC's regulatory authority over the excavation of the pond in question. The determination of legal conclusions is within the exclusive province of the court, and requires review of the applicable statutes and regulations, not testimony. *See Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003); *O'Quinn v. Beach Associates*, 272 S.C. 95, 249 S.E.2d 734 (1978); *Catawba Indian Tribe of SC v. The State of SC*, 372 S.C. 519, 642 S.E.2d 751 (2007).

Rather than applying the conditions of the NWP and the NPDES General Permit and the plain language of the water quality regulations at 61-101, the Order of January 21, 2010, justifies elimination of DHEC review of these additional wetland and water quality impacts based on lay testimony about the legal requirements.

II. The ALJ Erred in Concluding that Roper Pond, LLC Qualifies for Coverage Under the NPDES General Permit for Storm Water

As discussed in the description of the required permits above, in order to qualify for coverage under the NPDES General Permit and obtain a stormwater permit, Roper Pond, LLC must meet the conditions of the NPDES General Permit. The ALJ failed to evaluate the project for compliance with those conditions, specifically whether Roper Pond, LLC has been issued an effective 404 Clean Water Act permit, which is a prerequisite to coverage under the NPDES Permit.

A. The NPDES Construction General Permit for Stormwater Discharges Requires an Effective Clean Water Act Permit

The NPDES General Permit expressly requires that any Corps of Engineers 404 permit be issued and effective prior to DHEC granting coverage under the NPDES General Permit. (R. p. 481). The Corps requires DHEC to provide a copy of the state certification in order for the Corps 404 permit to be effective. (R. pp. 555-562; 922-30). Documents available on DHEC's website describing the process for obtaining NPDES coverage also confirm that a Corps permit must be obtained prior to NPDES coverage. (R. p. 564). As discussed above, DHEC did not issue a certification letter for this NWP #29, thus the Corps permit, and in turn the NPDES Permit coverage, are not effective.

B. The General Permit Requires a Clean Water Act Permit to Use the Lily Pad Pond as a Component of the Stormwater Management System

The excavation of the lily pad pond would lower the water levels so that the pond could hold a greater volume of water and be used for stormwater detention. Ms. Stewart said that a stormwater detention pond would be considered a water control structure. (R. p. 171). Under the terms of the NPDES General Permit, water control structures are required to be placed on upland to the maximum degree practicable. (R. p. 498). If the water control structure is to be placed in waters of the State, the Corps must issue a 404 permit. (R. p. 498). As discussed above, in order for the Corps 404 permit to be effective, DHEC must issue a 401 water quality certification of the 404 permit. And as discussed above, no 401 water quality certification has been issued for the dredging and excavation of the pond and/or its use as a water control structure.

The DHEC general NPDES Permit specifically requires compliance with DHEC's

stormwater regulations, including S. C. Code Ann. Regs. § R.72-301.C.(7). (R. p. 487). DHEC's stormwater regulations, specifically Section 72-307.C.(7), require that where "existing wetlands are intended as a component of an overall stormwater management system, the approved stormwater management and sediment control plan shall not be implemented until all necessary federal and state permits have been obtained." S. C. Code Ann. Regs. § R.72-301.C.(7).

DHEC's approval of the stormwater permit is expressly conditioned on obtaining DHEC 401 water quality certification approval of this specific project. Because DHEC did not issue a 401 water quality certification for the proposed project, Roper Pond, LLC does not have valid approvals for all of the impacts to wetlands and waters on site.

III. The Petitioners Have Standing to Maintain This Appeal

A. The Individual Residents Have Standing

The ALJ erred in concluding that the individual Appellants do not have standing. The ALJ's conclusion is not supported by the evidence. The ALJ's findings give a cursory review of the Appellants' testimony, ignoring the uncontested testimony of the Appellants. The ALJ misconstrues the law of standing by concluding that the Appellants must have a "property interest in either the Pond or Cary Lake" to have standing.

In *Sea Pines Association v. SC Dept. of Natural Resources*, 345 S.C. 594, 550 S.E.2d 287 (2001), this Court adopted the basic legal test for standing announced in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130 (1992). See also *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (2003). The three-pronged test arising from *Lujan* is as follows:

First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

Lujan, 112 S. Ct. at 2136 (internal citations omitted).

The ALJ erred by concluding, without any supporting evidence, that Linda Jackson's interest in the view of the Pond is a "general interest common to all members of the public," and thus does not give rise to an injury-in-fact. (R. p. 7). It is true that an environmental plaintiff must have a "personal stake" in the subject matter of the case, such that the injury is not "merely a general interest common to all members of the public." (R. p. 21, citing *Florence Morning News, Inc. v. Building Comm'n.*, 265 S.C. 389, 218 S.E.2d 881 (1975) (quoting *Ex parte Levitt*, 302 U.S. 633 (1937)). However, in this case, the ALJ failed to give proper consideration to case law indicating that an injury can be common to a great many members of the public, and still be sufficiently personal to a specific individual to give the individual standing to sue. See *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

It is a well settled legal principle that the fact that a plaintiff is part of a large class of potential appellants is no reason to deny standing. As the United States Supreme Court noted in *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), while all citizens have the right to use public resources, not all citizens suffer an impact from a project affecting those resources:

The impact of the proposed changes in the environment of Mineral King will not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area will be lessened by the highway and ski resort.

405 U.S. at 735, 92 S. Ct. at 1366. The difference between those who have standing and those who do not, the Court concluded, was **actual use of the affected area**.

The *Sierra Club v. Morton* Court ruled that “[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.” *Id.* at 734. See also *Pye v. United States*, 269 F.3d 459, 469 (4th Cir. 2001); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130 (1992); *Federal Election Comm’n. v. Akins*, 524 U.S. 11, 118 S. Ct. 1777 (1998) (where a harm is concrete, though widely shared, the Court has found “injury in fact.”).

The principles from *Sierra Club v. Morton* have been repeatedly affirmed and elaborated on in federal courts. The Fourth Circuit ruled that “[w]hile it is true that the Court has stressed that a generalized grievance shared by the population at large cannot be a basis for standing, . . . it is equally true that merely because an injury is widely held does not necessarily render it abstract and thus not judicially cognizable. . . . ***So long as the plaintiff himself has a concrete and particularized injury, it does not matter that legions of other persons have the same injury.***” *Pye v. U.S.*, 269 F.3d 459, 469 (4th Cir. 2001) (internal citations omitted).

In this case it matters not whether others share the injuries alleged by the

Appellants, it matters only that these Appellants will suffer an injury to their aesthetic and recreational interests.

The court in *Pye* also reaffirmed the principle that “aesthetic and environmental injuries can constitute an injury in fact sufficient to support a plaintiff’s standing.” *Id.* at 469. (citing *Friends of the Earth, Inc. v. Laidlaw Envt. Servs. (TOC), Inc.*, 528 U.S. 167, 120 S.Ct. 693 (2000); *Sierra Club v. Morton*, 405 U.S. 727, 735, 92 S.Ct. 1361 (1972); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 73-4, 98 S.Ct. 2620 (1978)). The court in *Pye* noted that if those who are seeking to protect the environmental quality of the areas they use do not have standing, then “the requirement for . . . public input would be little more than a meaningless procedural calisthenic that would provide little or no protection to those most directly affected by the governmental action.” *Pye v. U.S.*, 269 F.3d 459, 468 (4th Cir. 2001) (citing *Society Hill Towers Owners’ Assn. v. Rendell*, 210 F.3d 168, 176 (3rd Cir. 2000); *see also, Covington v. Jefferson County*, 358 F.3d 626, 651 (9th Cir. 2004) (Gould, concurring) (“injury to all is injury to none” theory would “deny standing to every citizen such that no matter how badly the whole may be hurt, none of the parts could ever have standing to go to court to cure a harmful violation.”); *U.S. v. SCRAP*, 412 U.S. 669, 688, 93 S. Ct. 2405 (1973) (“To deny standing to persons who are in fact injured because many others are also injured, would mean that the most injurious and widespread . . . actions could be questioned by nobody. We cannot accept that conclusion.”)).

Next, the ALJ erred in concluding that the Appellants “failed to identify any harm.” (R. p. 22). The Appellants Linda and Robert Jackson live on Kaminer Road,

which is adjacent to the lily pad pond and Roper Pond, LLC's property. Ms. Jackson has walked or run past the pond "thousands and thousands" of times and has enjoyed seeing the pond nearly every day over the 37 years that she has lived in the Forest Lake Community. (R.p. 373). She said the pond is very special to the community and it is "absolutely beautiful." (R. p. 374). She also walks around Cary Lake, which is downstream from the lily pad pond. (R. p. 375). She has seen sedimentation and garbage coming from upstream, as well as witnessed flooding associated with stormwater problems in that area. (R. p. 375). She said that if the pond were excavated, she would be sad not to see and enjoy the pond any more. (R. p. 376). She is also concerned about more sedimentation to Cary Lake and harm to the Gills Creek watershed, which is already impaired. (R. p. 375). Ms. Jackson knows the other Appellants, has participated in community meetings regarding the proposed project, and said that the other Appellants share her concerns. (R. p. 379).

Elaine and Gene Starr have lived on Sandy Shore Road, which is on Cary Lake, for 38 years. (R. p. 394). The Starrs swim, water ski, boat and fish with first their four children and now their grandchildren on Cary Lake. (R. p. 395). Ms. Starr said that the water in Cary Lake is not as clear as it used to be and that there is a lot of sediment in the lake. (R. p. 395).

The ALJ's conclusion that "Ms. Starr's concerns regarding an increase in runoff rate would thus be a result of a violation of the General Permit, not the Department's issuance of coverage under the General Permit" has no factual support. (R. p. 23). Ms. Starr said that based on her experience living on Cary Lake, a residential development

will have an impact on the lake because of the increased density, regardless of whether the project proceeds according to the permit. (R. pp. 407-408). The ALJ concluded that Ms. Starr alleged that the proposed project would “negatively impact Cary Lake even if the SWPPP approved by the Department is implemented as designed” and that “increased density . . . would have a detrimental impact . . .” (R. p. 23). She said that “if you change the whole landscape, then you’ll have a problem” with stormwater, which is her primary concern. (R. p. 412). In her experience, it is better to correct potential problems before they arise, rather than after the project is finished, which was not done in this case. (R. p. 417).

The ALJ erred in dismissing Ms. Starr and the Cary Lake Appellants as “entirely speculative.” (R. p. 23). The ALJ provides scant explanation of this conclusion, and ignores the uncontradicted testimony of the Appellants. The Appellants testified that their ability to enjoy recreational activities, along with their aesthetic interests, would be harmed by the proposed project. The Appellants use and view the area proposed to be impacted on a regular and frequent basis, and have definite plans to continue doing so.

Ms. Starr has also enjoyed viewing the lily pad pond and said it is “absolutely gorgeous.” (R. p. 400). She said there are “white blooms, pink blooms, and you can see lots of life around it, like dragonflies” and that it is an aesthetic party of the community. (R. pp. 400; 413). She is concerned about the affects of dredging the pond because there is a lot of life in the sediment itself and the lilies will not be there after it is dredged. (R. p. 401).

The parties stipulated that the testimony of Linda Jackson would be representative

of the individual Petitioners who reside in the Kaminer Station area, and that Elaine Starr's testimony would be representative of those the individual Petitioners who are property owners on Cary Lake. This testimony evidences the harm alleged by the Appellants.

The United States Supreme Court has stated that the injury required for standing purposes need not be a substantial injury:

The Government urges us to limit standing to those who have been "significantly" affected by agency action. But, even if we could begin to define what such a test would mean, we think it fundamentally misconceived. "Injury in fact" reflects the statutory requirement that a person be "adversely affected" or "aggrieved," and it serves to distinguish a person with a direct stake in the outcome of a litigation – even though small – from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, . . . a \$5 fine and costs, . . . ; and a \$1.50 poll tax [W]e see no reason to adopt a more restrictive interpretation of "adversely affected" or "aggrieved." As Professor Davis has put it: "The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." Davis, *Standing: Taxpayers and Others*, 35 U.Chi.L.Rev. 601, 613. See also K. Davis, *Administrative Law Treatise* ss 22.09--5, 22.09--6 (Supp. 1970).

United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 93 S.Ct. 2405, 37 L. Ed. 2d 254 (1973) (Internal citations omitted).

The "identifiable trifle" standard was recently re-affirmed by the Fourth Circuit. *Friends of the Earth, Inc. v. Gaston Copper*, 204 F.3d 149 (4th Cir. 2000): "the claimed injury 'need not be large, an identifiable trifle will suffice.'" 204 F.3d 149, 156, *quoting* *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 557 (5th Cir. 1996) (internal quotation marks omitted). See also, *Conservation Council of North Carolina v. Costanzo*, 505 F.2d

498, 501 (4th Cir. 1974). In this case, the Appellants have asserted far more than the “identifiable trifle” required to establish injury.⁴

The Appellants have established a causal connection between the harm – loss of aesthetic enjoyment in viewing the pond and its wildlife – and the challenged action – DHEC’s failure to review impacts resulting from excavation of the lily pad pond as required by its regulations and its water quality certification of the Nationwide Permit.

B. The Town of Arcadia Lakes Has Standing

The ALJ also erred in concluding that the town of Arcadia Lakes did not have standing. The ALJ misconstrues the law of standing as applied to municipalities by applying a more restrictive analysis than is supported by case law.

Few cases in South Carolina have addressed the law of standing as applied to municipalities. As for the town asserting standing based on its own interests, the ALJ cites to two cases: *Glaze v. Grooms*, 324 S.C. 249 (Ct. App. 1996) and *City of Spartanburg v. County of Spartanburg*, 303 S.C. 393 (1991). Both of these cases occur in the narrow context of one municipal entity challenging the actions of a separate municipal entity. The ALJ cites these cases for two principles in regard to municipality standing: a municipality generally “must allege an infringement of its own proprietary interests and statutory rights” and must allege an injury/infringement distinct from that of its individual citizens. The ALJ errs in his application of these principles.

Neither *Glaze*, *City of Spartanburg*, nor any other South Carolina case Petitioners have been able to uncover expands on exactly what it means for a municipality to suffer infringement of a “proprietary interest” or “statutory right” distinct from its citizens.

Glaze simply recites the principles, and the one-page *City of Spartanburg* opinion provides little elaboration. However, reference to other jurisdictions that have applied these standing principles under circumstances similar to the ones at hand make clear that Arcadia Lakes' allegations are sufficient to establish standing.

The "proprietary interests" that would serve to provide a municipality standing are not as narrow as read by the ALJ. "The term 'proprietary' is somewhat misleading, for a municipality's cognizable interests are not confined to protection of its real and personal property. **The 'proprietary interests' that a municipality may sue to protect are as varied as a municipality's responsibilities, powers, and assets.**" *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197-98 (9th Cir. 2004) (emphasis added). The court in *City of Sausalito* reached this conclusion while noting, the same as South Carolina courts, that a municipality could not simply assert the interests of its citizens and instead only had standing to protect its own "proprietary interests." *Id.* at 1197. In elaborating on the type of interests that are sufficient to confer standing on a municipality the court noted as follows:

We have recognized that a municipality has an interest in, inter alia, its ability to **enforce land-use and health regulations**, *Scotts Valley Band of Pomo Indians of Sugar Bowl Rancheria v. United States*, 921 F.2d 924, 928 (9th Cir. 1990), and its **powers of revenue collection and taxation**, *Colorado River*, 776 F.2d at 848-49. A municipality also has a proprietary interest in **protecting its natural resources from harm**. *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 944 (9th Cir. 2002), amending 271 F.3d 911 (9th Cir. 2001). We have also found constitutionally sufficient injury to proprietary interests where **"land management practices of federal land could affect adjacent [city]-owned land."** *Douglas County v. Babbitt*, 48 F.3d 1495, 1501 (9th Cir. 1995) (internal quotation marks and citation omitted).

Id. at 1198 (emphasis added).

The court found the City of Sausalito had demonstrated standing in part by alleging potential “injury to Sausalito's natural resources, citing an increase in ‘noise and trash,’ ‘impaired air quality,’ and harm to its ‘marina, parks, trails and shoreline’” from the challenged action. Further, the court found as sufficient to confer standing Sausalito’s allegations of injury to the town’s “aesthetic appeal in that the congestion accompanying the [challenged action] ‘will destroy the City's quiet, beauty, serenity and quaint and historic village character and attributes.’” Finally, the court relied on Sausalito’s allegations of a detrimental increase in traffic and crowds as a result of the challenged action. *Id.* at 1199.

In *Township of Belleville v. Federal Transit Admin.*, 30 F.Supp.2d 782, 789 (D.N.J. 1998), the court found a municipality had standing to bring a suit based on construction of a rail project that would generate “noise, air, and visible pollution” within the town’s borders. Providing further that “the township claims that the rail service will pose significant danger to its pedestrians, increase traffic, strike a blow to ‘civic pride’, and result in a loss of property taxes. If such injuries are established, the Court finds that it would be impossible not to conclude that at least some of these injuries also result in discrete and particularized harm to the township.” *Id.* In reaching this conclusion, the court applied the three prong test from *Lujan*, which, as noted above, was adopted by South Carolina in *Sea Pines Association v. SC Dept. of Natural Resources*.

In *City Of Albuquerque v. U.S. Dept. Of Interior*, 379 F.3d 901 (10th Cir. 2004), the city challenged the process by which the Department of the Interior chose the location to construct its new office building. The Department challenged the standing of

the city. The city did not allege the infringement of a real property interest. Far from it, the City alleged that by locating its offices outside the central business area, the Department was “weakening the City of Albuquerque and discouraging development and redevelopment of the central business area.” *Id.* at 912. Applying *Lujan*, the Court found the city had demonstrated standing. *See also, White v. Smith & Wesson Corp.*, 97 F. Supp. 2d 816, 824 (N.D. Ohio 2000) (applying *Lujan*, court found standing for a municipality suing gun companies under products liability based on allegations of increased municipal expenses based on defective firearms).

The analysis in the above cases is in stark contrast to the ALJ’s analysis. While the above courts cite to “proprietary” interests like diminishment of property value, impairment of municipal environment, increased traffic and congestion, and loss of civic pride, town character and aesthetic appeal as bases for standing, the ALJ exclusively inquires into whether the Town owns a portion of Cary Lake, the Lake within the Town’s borders where the water from Roper Pond, LLC flows. As with the individual Appellants, the ALJ’s focus on property ownership is a misconstruction of the law of standing.

Appellants are aware of no precedential case law to indicate that municipalities are subjected to more stringent standing requirements than individuals. On the contrary, the above cases demonstrate that the same analysis of standing is applied to municipalities as is applied to individuals. The analysis of individual petitioner standing above, as traced through *Lujan*, *Sea Pines*, *Sierra Club v. Morton*, *Pye* and the like is equally applicable to the town of Arcadia Lakes. Just as the individual petitioners need not own property to establish standing, Petitioners would respectfully submit that the

same applies to the Town.

The Town has demonstrated an “injury in fact” sufficient to confer standing. In his deposition in this case, Richard Thomas, mayor of Arcadia Lakes, testified on behalf of the Town as to the Town’s interests in this litigation. Water from Roper Pond goes straight under Trenholm Road into Cary Lake, which is in the town of Arcadia Lakes. (R. p. 825). The Town’s interest in protecting the environmental quality of Cary Lake, a natural resource within its borders, is at stake in this litigation. When asked what detriment the town will sustain if the project proceeds under the permit as issued, Mr. Thomas directly responded, “the detriment is potential harm to the water flowing through the project under North Trenholm Road, and into Cary Lake” which would work a “harm to the environmental interest of the town.” (R. p. 822, lines 16-21). As cited above, citizens of Arcadia Lakes, including the individual petitioners in this case, use Cary Lake for a variety of recreational purposes.

Second, as was cited as a basis for municipal standing in *Township of Belleville* and *City of Sausalito*, the challenged conduct stands to damage the Town’s interest in maintaining its character and desirable attributes. Mr. Thomas noted that “[o]ur town motto is seven lakes - one town.” (R. p. 823, lines 3-4). The “seven lakes [within our borders] are a vital part of our identity” and environmental harm to Cary Lake stands to damage this identity. (R. p. 823, line 3). A related threat from the challenged conduct is the harm to the Town’s aesthetic appeal. Mr. Thomas cited the risk of “[h]arm to the aesthetic interest of the Town of Arcadia Lakes being that the project is surrounded on three sides by the town” and that water flowing through the project flows directly into a

lake within the Town's borders. (R. p. 822, lines 20-22). These interests, of course, do not exist in a vacuum, and diminishing the aesthetics, character and environment of the Town would result in decreased demand for residing in the Town. As the court noted in *Township of Belleville*, this type of harm threatens property value and thus the municipalities property tax revenue. 30 F. Supp. 2d at 789. The above testimony of the individual appellants regarding the diminishment of their use, enjoyment and value of Cary Lake supports the likelihood of these harms.

Further, the permit and project threaten the Town's ability to comply with federal law. Mr. Thomas noted that "we are responsible for the water that flows into Cary Lake as well as out through our NPDES rules and regs." (R. p. 828). Mr. Thomas elaborated on the Town's responsibilities under the NPDES provision of the Clean Water Act as follows: The town is responsible for what comes into the town and what leaves the town as far as water quality. If the water quality coming into the town is not regulated by the town and we allow it to flow through the town [into downstream water bodies], then the way I understand the NPDES, we would then be responsible. Therefore, we could -- it could result in financial and/or litigation for the mitigation of that damage. Whatever that would be. (R. p. 844, lines 5-15). The Town's ability to comply with federal law is directly contingent on the outcome of this litigation.

Finally, the discussion of the Town's standing has to this point focused on harm directly resulting from the dredging of Roper Pond and the water flowing from the pond into the Town. However, for purposes of the standing inquiry, the harm to the Town extends to the proposed apartment complex as a whole, as the size and design of the

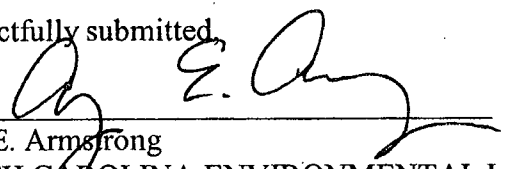
Roper Pond Apartments depends on the availability of Roper Pond for the development's stormwater. In regard to harm to the Town from the Apartments themselves, which is imminent if the proposed project moves forward, Mr. Thomas presented the Town's position that the value of properties in the vicinity of the Apartments, which would be within the Town's boundaries, would be diminished. (R. p. 883). The density and character of the proposed Apartments are inconsistent with surrounding development in the Town. (R. pp. 885; 893-894). The Town is also concerned about additional security issues and need for policing as a result of the Apartments. (R. p. 884). Thomas expressed that with the transient nature of those residing in the Apartments -- meaning people who rent for a relatively short time rather than property owners-- the Town anticipated increased security issues and crime in the vicinity. (R. pp. 884; 894). Thomas also cited increased traffic and congestion in the town from adding a dense development with 400 to 500 residents on the border of the Town of Arcadia Lakes, which only has 890 residents. (R. p. 894).

All of this testimony was uncontradicted. All of these harms are of the type accepted as a basis for standing in the above cases and any of these harms constitute discrete and particularized harm to the township. The ALJ erred in ignoring the only evidence before him and by basing his conclusion on the premise that the Town, as well as the individuals, must have a property interest in the project site or Cary Lake. The ALJ erroneously applied the standing standard to both the Town and the individual Appellants.

CONCLUSION

WHEREFORE, the Appellants respectfully request that this Court issue an Order reversing the Final Order and Decision of the Administrative Law Judge and concluding that Roper Pond, LLC does not have valid state approval for the dredging and excavation of the lily pad pond, and that the Appellants have standing to maintain this action.

Respectfully submitted,



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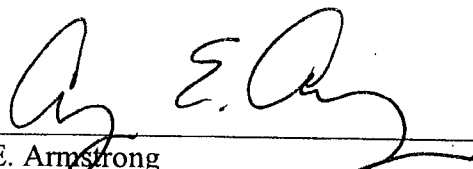
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The undersigned does hereby certify that this Final Brief complies with SCRAP Rule 211(b).



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February 25, 2011

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 09-ALC-07-0069-CC

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson,
Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker,
Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey,
Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D.,
Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, ... Petitioners,

vs.

South Carolina Department of Health and Environmental Control
and Roper Pond, LLC, ... Respondents.

FINAL REPLY BRIEF OF APPELLANTS

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ARGUMENT

The Respondents do not contest that DHEC has authority to place conditions on its 401 Water Quality Certification of U.S. Army Corps of Engineers ("Corps") Nationwide Permits ("NWP"). The Respondents do not contest that in order to qualify for DHEC's 401 Water Quality Certification of a NWP, the project must meet the conditions of that certification. The Respondents do not contest that DHEC's 401 Water Quality Certification of NWPs applies only to those impacts specifically identified in the NWPs. The Respondents do not contest, and the ALJ found, that the project would impact wetlands in excess of what is authorized under the NWP, specifically excavation of the lily pad pond. And the Respondents do not contest that those impacts exceed what DHEC reviewed and authorized when it issued its conditional certification of the NWPs.

Indeed, the ALJ found that an individual 401 Water Quality Certification is required if a proposed activity does not meet the conditions of the Nationwide Permit and the 401 Water Quality Certification issued by the Department for the Nationwide Permit. (R. p. 15, FF #27). This project's failure to qualify for approval under DHEC's 401 Water Quality Certification is the basis for the Appellant's challenge because that approval is a prerequisite to receiving coverage under the NPDES General Permit that is the subject of this appeal. Yet the Respondents fail to acknowledge the fundamental issue in Appellants' brief: Did DHEC and the ALJ err in approving the proposed project because it fails to meet the conditions of DHEC's 401 water quality certification of Nationwide Permits, which is a prerequisite to coverage under the NPDES General Permit for Stormwater Discharges? Instead, the Respondents' focus, as well as the ALJ's, is on

federal permit requirements under the Clean Water Act, rather than State requirements, along with assumptions about the intent of the NWP program and DHEC's authority.

I. Respondents and the ALJ Erroneously Equate Federal Regulatory Requirements with State Regulatory Requirements

DHEC's 401 Water Quality Certification review authority originates from the Clean Water Act, 33 U.S.C § 1341(a). It is true that a Corps 404 permit is what triggers the need for a 401 water quality certification, but once certification is triggered DHEC has authority to consider, and in fact does consider, impacts beyond those regulated by the Corps. (R. pp. 251-52). In fact, the General Assembly gave DHEC broad authority to review any "alterations to the aquatic ecosystem in the vicinity of the project," "adverse consequences on water quality," "all potential water quality impacts of the project, both direct and indirect, over the life of the project," and the "physical, chemical and biological impacts, including cumulative impacts," in promulgating the Water Quality Certification Regulations. S.C. Code Ann. Regs. 61-101.F.3. & 61-101.F.5. The plain language of the water quality certification regulations make it abundantly clear that the legislature intended DHEC's scope of review, once triggered, to include all water quality impacts stemming from a proposed project, regardless of the Corps' regulatory authority. Respondents' arguments that certification review is limited only to activities regulated by the Corps contravenes the plain language of the certification regulations and has no basis in law.

The Respondents spend significant time arguing that no federal permit is required for dredging and excavation of the lily pad pond. (Resp. Brief pp. 13-17). Appellants

have never argued that a federal Clean Water Act 404 permit or a Rivers and Harbors Act Section 10 permit is required for the dredging and excavation of the lily pad pond.¹ States are responsible for enforcing water quality standards on intrastate waters, of which the lily pad is one. 33 U.S.C. § 1319(a). It is through the 401 certification program that States ensure compliance with State water quality standards. *See, e.g., PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 114 S.Ct. 1900 (1994).

The Appellants' argument is that approval for coverage under the NPDES General Permit expressly requires the applicant to obtain any necessary 404 permit. In this case, a 404 permit was necessary for the filling of 0.075 acres of the 1.8 acres of jurisdictional

¹ Appellants contend that a 404 permit is required to bring a navigable water into a use which it was not previously subject, such as converting the lily pad pond into a water control structure. This argument is based on the Clean Water Act requirement that "Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section." 33 U.S.C. § 1344(f)(2). The argument is also based on S.C. Code Ann. Regs. 72-307.C(7) and NPDES General Permit Section 2.1(C) which require that an applicant obtain a 404 permit prior to receiving coverage under the NPDES General Permit and/or using the pond as a water control structure. Together with DHEC's Jill Stewart's admission that Roper Pond, LLC's plans call for using the lily pad pond as a water control structure, the CWA, the DHEC regulations and NPDES Permit provide the basis for Appellants' argument that a 404 permit is required to use the lily pad pond as a water control structure.

Roper Pond, LLC did not identify in its original application to the Corps that it intended to excavate the lily pad pond and utilize the pond as a water control structure so the Corps would have no way of knowing that it intended to do so. There is no evidence that the Corps made a decision that a 404 permit is not needed to bring the pond into a new use in the form of Roper Pond, LLC's proposal to use the pond as a water control structure, and there is no legal support that a 404 permit is not necessary to utilize the lily pad pond as a water control structure.

wetlands on the property. In order to obtain a 404 permit, the applicant must have a 401 water quality certification. In this case, DHEC did not review the project and issue a certification letter stating that the project is consistent with the 401 Water Quality Certification issued for NWP #29, and in fact the project is not consistent with the certification because it involves impacts that go beyond what is authorized under NWP #29.

DHEC admits that a “specific determination” is required to insure that a project meets the 401 certification of an NWP before it issues a certification letter. (R. p. 609). DHEC made such a determination that the project “is consistent with the 401 Water Quality Certification issued for Nationwide Permit Number 39.”² (R. p. 563). DHEC admits that no such determination was conducted for NWP #29. And DHEC admits that neither the storm water permit nor the certification of NWP # 39 covered the impacts to the pond. (R. pp. 167 & 244).

What the Respondents advocate, and the ALJ sanctioned, is for the citizens of South Carolina to trust that the Corps will ensure that State certification conditions are met in order to qualify for coverage under the State’s NWP certification. (Resp. Brief pp.

² Of course, when George Whatley of B.P. Barber, Roper Pond’s consultant, submitted the application on April 30, 2008, he represented that there was to be no dredging or excavation. (R. pp. 553-554). Mr. Whatley testified that at the time DHEC issued its certification letter dated October 2, 2008, he had not notified DHEC that Roper Pond was planning to dredge the pond and in fact he never provided DHEC such notification. (R. pp. 472-473). The evidence indicates that DHEC’s stormwater section became aware of plans to excavate the pond in November, 2008, and that the section manager, Jill Stewart, inquired about whether the excavation was covered under the NWP. (R. pp. 551-552 & 921).

30-31). There is no factual or legal basis for this position. While the Corps may have enforcement authority, it is fully within DHEC's authority to review a project to ensure compliance with its certification conditions and in fact DHEC issued a certification letter for compliance with NWP #39 in this case.³ It failed to issue a certification letter for compliance with NWP #29, which provides the basis for Appellants' claim that the project fails to qualify for coverage under the NPDES General Permit.

II. DHEC Has Authority to Ensure Compliance With Its 401 Certification Conditions

A. DHEC Has Authority to Impose Conditions on Its Certification

Respondents' argument that DHEC 401 Certification conditions cannot possibly trigger an individual review of a NWP project, because it would be illogical, is unfounded. (Resp. Brief p. 26). DHEC has full authority to ensure compliance with the conditions of its 401 Water Quality Certification of the Corps' Nationwide Permits. "Any certification issued by the Department shall also set forth any limitations, conditions, or monitoring requirements necessary to assure maintenance of classified or existing water uses and standards and compliance with other requirements of these regulations or other appropriate requirements of State law." S.C. Code Ann. Regs. 61-101.A.5. "The Department may issue, deny, or revoke general certifications for categories of activities or

³ Appellants note that there is a distinct difference in placing conditions on an individual certification versus conditions on a NWP. For individual certifications, DHEC knows exactly what activity will be taking place and often places project-specific conditions on those activities. For NWPs, the exact nature and extent of the activity could not be known when the certifications were issued, thus the certification conditions in part tell under what circumstances that certification applies.

for activities specified in Federal nationwide or general dredge and fill permits pursuant to Federal law or regulations. Such general certifications are subject to the same process as individual certifications.” S.C. Code Ann. Regs. 61-101.A.3. Taken together, DHEC can set forth any limitations on its certification of the NWP that are necessary to ensure compliance with State law. And DHEC did just that in issuing its certification of the NWPs in 2007.

In issuing its 2007 decision, DHEC authorized certification under the NWPs only if certain general conditions are met. (R. p. 563). Thus, in issuing its NWP 401 certification with conditions, DHEC clearly believed that there would be instances when a project may qualify under the Corps’ NWP terms, but still need individual review to ensure compliance with DHEC’s terms. Respondents, and the ALJ, attempt to limit DHEC’s review to only what is regulated by the Corps. (Resp. Brief pp. 27-28). Under the interpretation Respondents advocate, the general and special conditions DHEC imposed on the NWPs issued by the Corps would have no relevance or significance. As long as the project met the Corps’ NWP requirement, no review of DHEC’s 401 conditions would ever take place. If DHEC review was limited to the same review as the Corps, it would render the 401 Certification program redundant and superfluous.

B. DHEC Must and Does Review Projects for Compliance with its NWP 401 Certification Conditions

DHEC’s Chuck Hightower testified that DHEC does review projects and issue a certification letter, if it finds that the project qualifies for its certification of the NWP. (R. pp. 251-262). If it does not meet the specific and general conditions of the NWP

certification, Hightower said DHEC requires an individual certification. (R. p. 253). And DHEC did just that for NWP #39 in this case. But this project requires a NWP #29 and DHEC did not issue a certification letter for NWP #29.

If the NWP general and special conditions have been met thereby qualifying the project for coverage under DHEC's Water Quality Certification, the applicant may proceed. But if they have not been met, Hightower said DHEC requires an individual certification. (R. p. 253).

There is no evidence that the 30 day time frame within which the applicant may proceed after giving the Corps its Pre-construction Notification is insufficient for DHEC to determine whether the conditions of certification have been met or not. In fact, there was no complaint that DHEC issued its initial certification letter of NWP #39 in an untimely manner, and Respondents presented no evidence that "it would be impossible for the Department to conduct a review of the scope advocated by the Appellants within this [30 day] time period."⁴ (Resp. Brief p. 30). DHEC must and has issued certification letters determining that project requiring Preconstruction Notification meet its NWP certification conditions.

C. Appellants are Not Seeking Enforcement, Withdrawal or Revocation of the Certification

Contrary to Respondents' assertions, we are not talking about bringing an enforcement action to enforce conditions of the certification. And contrary to

⁴ Again, noting that Appellants only suggest that DHEC review NWP projects to ensure that the project meets the conditions of the 401 certification.

Respondents' assertions, Appellants do not advocate a DHEC revocation or withdrawal of its certifications of the NWP (Resp. Brief pp. 31-32). Rather we are seeking proper implementation of the NWP certification to ensure that a project meets the certification conditions prior to qualification for coverage under the NPDES General Permit. No enforcement, withdrawal or revocation is required. Rather, DHEC's certification of NWP does not apply to this project because the project involves impacts that exceed what was publicly noticed and authorized under the NWPs and their conditions of Certification.

D. Nationwide Permits Do Not Limit DHEC's Authority

Respondents make vague arguments about the rationale for issuing Nationwide Permits and the intent behind DHEC's condition that its review of a project "includes all land within the project boundary under single ownership. It is not interpreted to mean only the land area directly impacted by each NWP request." (R. p. 573). Respondents cite to Chuck Hightower's testimony on his "understanding" of the permit conditions and speculate that the condition is "further clarification of . . . a prohibition of multiple use of the same Nationwide Permit within a single project."⁵ But there is no need to speculate on the intent of this condition – its meaning is clear – DHEC considers all the land

⁵ Corps regulations referenced by the Respondents say that two different NWPs can be used for one single and complete project, but the same NWP cannot be used twice. 33 C.F.R. 330.69(c). Corps regulations also state that a "Single and complete project means the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers." 33 C.F.R. 330.2(i). Nothing in this regulation is inconsistent with the plain meaning of the DHEC general condition that all lands impacted by the project must be considered in DHEC's review to ensure compliance. In fact, the Corps definition of "single and complete project" is consistent with the approach advocated by the Appellants. The only difference is that DHEC's regulatory authority pursuant to R. 61-101 exceeds the Corps authority under the Clean Water Act.

impacted by the project. In this case, those impacts include dredging of the lily pad pond.

And in this case, those impacts were not considered.

III. Review for Compliance with R. 61-68 and R. 61-101 is Triggered if a Project Does Not Meet the Conditions of a NWP Certification and/or Exceeds the Impacts Authorized Under a NWP

Taken to its logical end, Respondents arguments would mean that DHEC does not and cannot ever individually review a NWP project for compliance with the certification conditions, much less the water quality standards. Contrary to Respondents' brief (Resp. Brief p. 24), Appellants do not contend that DHEC's review of **any** project authorized under a Corps NWP must always include an assessment for compliance with S.C. Code Ann. Reg. 61-101.F(3). Similarly, Appellants do not contend that DHEC's scope of review for compliance with its NWP certification conditions is the same as the scope of review for certification of an individual permit. (Resp. Brief p. 29). Rather, Appellants contend that DHEC must review a NWP project for compliance with its certification conditions. When a project does not meet DHEC's conditions of its NWP certification and/or if the project's impacts exceed those impacts authorized under an NWP, then DHEC must review the project individually for compliance with the water quality certification and water quality standards regulations, including R. 61-101.F(3).

Respondents cite *Responsible Economic Development v. SCDHEC*, 371 S.C. 547, 641 S.E.2d 425 (2007), for the proposition that the State water quality standards are not applicable to a stormwater permitting decision. The statutory framework implicated in *RED* is wholly different from the one in play in this case. In *RED* there was no Corps 404

permit or 401 certification required as a prerequisite to obtaining the stormwater permit. In other words, there was nothing to trigger State water quality standards. In the case at bar, a Corps 404 permit and 401 certification are triggered by virtue of the fill of jurisdictional wetlands and are required in order to receive coverage under the NPDES General Permit, a stormwater permit, thus the water quality standards and certification regulations apply. The Appellants are challenging the granting of coverage under the NPDES General Permit, but the 404 permit and 401 certification are absolute requirements to obtaining such coverage, unlike the *RED* case.

IV. This Case is not an Appeal of DHEC's 2007 Certification Decision

Respondents' arguments that the appeal deadline to challenge DHEC's 2007 Water Quality Certification of the NWP has lapsed missed the point: there is no way Appellants could have known at the time the Certification was issued that Roper Pond would seek to dredge and excavate the lily pad, which is indisputably beyond the scope of Nationwide Permit #29. The general public, including the Appellants, had a right to rely on the Certification decision issued by DHEC, which includes a condition that DHEC would consider "all land within the project boundary," not "only the land area directly impacted" by the NWP request. (R. p. 573).

V. Challenge to Coverage Under NPDES General Permit Necessitates an Inquiry as to Whether the Terms of the NPDES Permit Have Been Met

Appellants' challenge is to the granting of coverage under the NPDES General Permit. As such, Appellants challenge whether the applicant has complied with the terms of the NPDES Permit, specifically that the applicant obtain a valid 404 Clean Water Act

permit and the accompanying, required 401 water quality certification. Because the 401 certification and 404 permit are prerequisites to NPDES coverage, review of whether the project meets the conditions of DHEC's water quality certification is properly before the Court. Appellants need not challenge the technical sufficiency of the SWPPP as stated by Respondents (Resp. Brief p. 34), but overall compliance with the NPDES General Permit. And Appellants have provided substantial evidence that the project does not qualify for coverage under the NPDES permit because there is no 401 certification of the 404 NWP.

VI. Appellants Meet the Test for Standing

A. Kaminer Station and Cary Lake Residents Have Standing

1. Injury-in-fact

Respondents never address one of the harms alleged by Linda Jackson and Elaine Starr – that the lily pad pond is a special amenity to the community and that if it the pond is excavated it would decrease their aesthetic enjoyment of the area. (R. pp. 376; 400-401; 413). And none of that testimony was contested. As discussed below, this is a classic example of the type of harm required to establish standing in environmental cases. (Aesthetic and environmental well-being are important ingredients of the quality of life in our society, and harm to aesthetic and environmental interests can provide the basis for standing to challenge permit decisions. *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361 (1972); *Pye v. U.S.*, 269 F.3d 459 (4th Cir. 2001); *see also American Canoe Assn. v. Murphy Farms*, 326 F.2d 505 (4th Cir. 2003)).

In South Carolina Wildlife Federation v. South Carolina Coastal Council, 296

S.C. 187, 371 S.E.2d 521 (1988), a case cited with approval in *Sea Pines*, it was held that where parties “alleged an individualized injury in the adverse effect of a specific decision of the Coastal Council on their members’ use and enjoyment of the fish and wildlife of the wetlands” that would be affected by a Coastal Council certification, “these allegations are sufficient to show standing.” 296 S.C. 187, 190, 371 S.E.2d 521, 523.

In *Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision)*, 332 S.C. 551, 505 S.E.2d 598 (Ct. App. 1998), the plaintiff had standing where she alleged an injury to her use and enjoyment of a wetland adjacent to her home, even though the wetland was owned by a private developer.

In *American Canoe Assn. v. Murphy Farms*, 326 F.2d 505 (4th Cir. 2003), the plaintiffs had standing where they expressed concerns regarding the quality of waters and alleged that these concerns affected their aesthetic, recreational, and economic interests in the waters.

In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 183, 120 S.Ct. 693 (2000), allegations that aesthetic and recreational values of the area would be lessened by the challenged activity was sufficient to confer standing.

In *Pye v. United States*, 269 F.3d 459 (4th Cir. 2001), adjacent landowners were held to have standing to challenge a wetlands permit based on alleged impacts on the cohesiveness and integrity of an area containing designated historic sites. The *Pye* Court ruled that:

“If the Residents do not have standing to protect the historic and environmental quality of their neighborhood, it is hard to imagine that

anyone would have standing to oppose this ... grant.”

Pye v. United States, 269 F.3d 459, 468 (4th Cir. 2001), quoting *Society Hill Towers Owners' Assn. v. Rendell*, 210 F.3d 168, 176 (3rd Cir.2000). As with *Pye*, if the individuals Appellants that live adjacent to and surrounding the proposed development site do not have standing to challenge the DHEC decision authorizing construction of the development, then it is indeed difficult to imagine who would have standing to challenge this decision.

Rather than address Appellants' allegations of environmental and aesthetic harm resulting from lowered water quality and loss of viewing the lily pad pond, Respondents' claim that Appellants must offer evidence that the SWPPP is not sufficient to control sedimentation and erosion control during development in order to prove standing. (Resp. Brief p. 37). This is an erroneous application of the law on standing.

The basis for standing in *Pye* was not harm resulting from a technical analysis of the permitted activity, rather it was the but-for relationship between the permitted activity and the alleged harm. And in this case the Appellants do not need to offer evidence on the technical sufficiency of the SWPPP, they merely need to make allegations of any injury that is “fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.” *Smiley v. South Carolina Dept. of Health and Environmental Control*, 374 S.C. 326, 649 S.E.2d 31 (2007) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S.Ct. 2130 (1992)). And Appellants did just that.

Both Linda Jackson and Elaine Starr testified collectively that they have seen sedimentation, impacts on water quality and flooding associated with stormwater problems in the project area. (R. pp. 375; 395; 407-408). Ms. Starr said that regardless of whether the SWPPP is followed, the project as designed will have adverse impacts on water quality of Cary Lake that she lives on because of the increased density – a scenario that she has repeatedly observed. (R. pp. 407-411). The increased density is directly traceable to the challenged activity, which is an NPDES stormwater permit authorizing construction of the proposed apartment complex development.

Both Ms. Jackson and Ms. Starr testified that in addition to water quality impacts, their aesthetic interests will also be harmed by not being able to view the lily pads and other wildlife using the pond, if it were dredged according to the approved stormwater permit. The dredging would also occur whether or no the SWPPP is complied with.

Harm in the form of concerns about adverse impacts to water quality, decreased recreational uses and decreased aesthetic enjoyment in viewing the lily pad pond are directly traceable to Roper Pond, LLC's proposed apartment complex for which it is seeking NPDES coverage. But for the proposed development for which Roper Pond, LLC seeks DHEC approval, none of these alleged injuries would occur.

The "prior general harm" that Respondents state is inadequate to establish injury is what provides Ms. Starr and Ms. Jackson's basis for concerns about sedimentation and lower water quality. That "prior harm" was the result of other developments that had to obtain stormwater permits from DHEC and have approved SWPPPs, just like Roper Pond. Those other developments also had to comply with all the permitting

requirements, yet water quality was still impacted. Past experience with water quality impacts resulting from increased density and development provide a rational basis for the Appellants' concerns about this project which are sufficient to establish a threat of future harm necessary for standing. The South Carolina Supreme Court, Court of Appeals and the Administrative Law Court have found standing in environmental permitting cases where appellants alleged potential future injury from challenged projects. *See, e.g., South Carolina Wildlife Federation v. South Carolina Coastal Council*, 296 S.C. 187, 371 S.E.2d 521 (1988); *Ogburn-Matthews v. Loblolly Partners*, 332 S.C. 551, 505 S.E.2d 598 (Ct.App. 1998); *Interstate Nuclear Services Corporation v. South Carolina Department of Health and Environmental Control*, Docket No. 96-ALJ-07-0558-CC, 1997 WL 757237 (November 21, 1997). These rulings echo decisions of the United States Supreme Court and the Fourth Circuit. *See, e.g., Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978); *Natural Resources Defense Council v. Watkins*, 954 F.2d 974 (4th Cir. 1992), quoting *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982); accord, *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1113 fn. 4 (4th Cir. 1988), citing *Valley Forge Christian College* for the proposition that "threatened rather than actual injury can meet minimum Article III standing requirements."

Appellants allege threatened future harm in the form of harm to aesthetic interests in viewing the lily pad pond, impacts on water quality and recreational activities. The prior harm provides a clear basis for the concerns about future harm to water quality and

common sense provides the basis for harm resulting from excavation of the pond and loss of lily pads and wildlife.

In addition, Appellants do not have to wait for those harms to occur through a violation, as suggested by the Respondents. If Appellants have standing to enforce a violation, as Respondents appear to acknowledge, then they have standing to challenge the activity that would give rise to that violation.

Respondents reliance on *Bailey v. SCDHEC*, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010) (*petition for certiorari pending*), as a basis to deny standing is misplaced. In *Bailey*, this Court ruled that Bailey failed to present evidence of harm to establish standing. Respondents claim that Appellants similarly failed to present evidence of harm because they did not “offer any evidence that the BMPs proposed by Roper Pond and approved by the Department in the SWPPP are inadequate to control sediment.” (Resp. Brief p. 38). Appellants need not present evidence on the limited issue of the technical sufficiency of the BMPs or SWPPP to establish an injury.

Appellants need only present evidence of injury that is fairly traceable to the challenged activity. In this case Appellants did present voluminous evidence of harm in the form of injury to their aesthetic, environmental and recreational interests that would flow directly from the proposed apartment development authorized by the challenged DHEC decision, as discussed above.

This case is distinguished from *Sea Pines Ass’n v. DHEC*, 345 S.C. 594, 550 S.E.2d 287 (2001). In *Sea Pines* the court ruled that Appellants did not have standing

because they were not able to demonstrate that their aesthetic interests would be harmed by seeing less deer than they currently saw.

... Appellants presented no evidence their opportunity to view and enjoy the deer would be diminished by the permits. The Appellant's injury is conjectural because it is not certain that reducing the size of the herd would decrease the number of deer actually viewed by the residents each day. Because deer population growth has remained constant on Sea Pines, the deer population decrease proposed by the Department may have little or no effect on the residents' ability to enjoy the deer.

Even if we assume Appellants have alleged a particularized harm, Appellants failed to present evidence the injury would be redressed by a favorable decision in this case.

Sea Pines, 345 S.C. 594, 602, 550 S.E.2d 287, 292 (2001).

In this case, there is only one pond and when the lily pads are gone there will be no more to view at all.

2. Causal Connection

The Respondents' assertion that there is no causal relationship between the challenged activity and the injury complained of is erroneous. As discussed above, all that is required is that the alleged harm be "fairly traceable" to the activity being challenged. *Smiley*, 374 S.C. 326, 649 S.E.2d 31 (2007). Excavation of the lily pad pond is part of Roper Pond, LLC's plan, and that plan was submitted to DHEC for the approval which is being challenged through this appeal. Jill Stewart testified that she had received plans showing that the pond elevation would be lowered and specifically asked Roper Pond whether the impacts to the pond were included in the 401 water quality certification approval. She was told that impacts were included in that approval, despite the fact that

DHEC had not issued a certification letter. (R. pp. 164-167, lines 12-14; R. pp. 580-581).

It is the excavation of the lily pad pond, along with concerns that the approved development will adversely affect water quality, which Appellants have identified as harms in the form of aesthetic injury from viewing the pond and its wildlife; recreational injury from decreased water quality in Cary Lake; and financial injury from the decreased property values.

3. Redress by a Favorable Decision

Appellants seek to have the Department's decision to grant coverage under the NPDES General Permit rescinded for failure to comply with the NPDES permit and obtain a valid and effective 404 permit and 401 certification. Specifically, Appellants believe that DHEC must conduct an individual review of water quality impacts resulting from the excavation of the lily pad pond because the project does not meet DHEC's 401 Water Quality Certification of the NWP and exceeds the activities authorized under the NWP. Should DHEC conduct this required review and find that the aquatic ecosystem would be destroyed by the dredging and excavation or that the project would adversely affect water quality downstream, then it could deny certification. If certification were denied, the lily pad pond ecosystem could be protected and downstream water quality could be protected, which would remedy the Appellants' alleged injuries.

B. The Town of Arcadia Lakes Has Standing

Respondents' Brief does not address the Town's interest in its aesthetic appeal and in maintaining its character and desirable attributes as a basis for standing. These

interests are recognized as a basis for municipal standing in the cases cited in Petitioners' Brief and the Town stands to suffer imminent and concrete injury from the dredging and lowering of the lily pad pond, whether or not the related development follows.

Petitioners do not dispute that the Town cannot bring an action on behalf of its citizens under the doctrine of *parens patriae*. Respondents contend the environmental interest of the town is "clearly" one-in-the-same with the interests of its individual citizens. (Resp. Brief, p. 43). Respondents do not elaborate on why they believe this to be clear. Presumably, Respondents take this position because both the Town and its individual citizens have environmental interests that are implicated in this action. However, while a municipality may not simply assert the interests of its citizens, the interests of a municipality may very well be "congruent with those of its citizens." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004). *See also, Capital View Fire Dist. v. County of Richland*, 297 S.C. 359, 361 377 S.E.2d 122, 124 (Ct. App. 1989) (citing Ninth Circuit case for proposition that "political subdivisions, such as cities and counties, may sue to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants."); *U.S. v. City of Pittsburg*, 661 F.2d 783, 787 (9th Cir. 1981) (ruling that "cities may sue to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants.").

The Town has a congruent but distinct environmental interest in the noise and visible pollution from this project, as well as the environmental quality of Cary Lake, the plants and wildlife therein, and groundwater and other connected water bodies within Town limits. While the Town and Individuals seek to vindicate these same

environmental interests, some of these interests have implications for the Town that are not shared with its individual citizens, in the form of diminished property tax base and aesthetic appeal, loss of overall Town character and the like. *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197-98 (9th Cir. 2004) and *Township of Belleville v. Federal Transit Admin.*, 30 F.Supp.2d 782, 789 (D.N.J. 1998), cases cited in Appellants' Brief, recognize a municipality's environmental interest as a basis for standing, under circumstances where the environmental interests of the municipality's individual citizens would also be at stake.

The Respondents argue that injuries to the Town from the Roper Pond apartment development itself (as opposed to those from the water quality issues accompanying the development) are "no more than speculation." (Resp. Brief, p. 46). If the apartment complex goes in, there will undoubtedly be more people with more car, which will increase the need for services, like the police security. Richard Thomas, mayor of Arcadia Lakes, testified on behalf of the Town as to the Town's interests in this litigation. Mr. Thomas testified at length as to the injuries the Town stood to sustain from the actual Roper Pond apartments -- namely diminished property value in the area, increased traffic, increased need for security -- and this testimony is uncontested in the record. (See citations to testimony in standing section of Petitioners' Brief). Respondents did not introduce any contradictory testimony or evidence in the record and now rely on an unsupported statement that the town's concerns are no more than speculation.

Respondents also argue that injuries from the apartment development are "clearly unrelated to the Department's decision at issue in this case." Again, Respondents do not

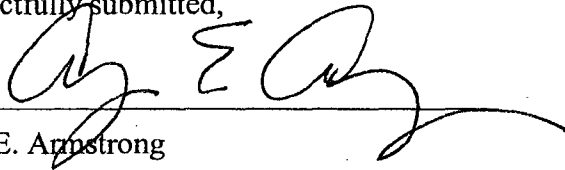
elaborate on why they believe this to be clear. This entire case arises from DHEC's granting of coverage to Roper Pond under "NPDES General Permit for Storm Water Discharges from Large and Small Construction Activities." This permit is not necessary, and this case does not exist, except for Roper Pond seeking to begin construction of its apartment complex. The permit is required for the construction of the apartments, and the apartment complex will be certain to occur once it has DHEC approval. Even if construction has not yet occurred, the Town "does not have to await the consummation of threatened injury to obtain preventive relief." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (internal quotations and citations omitted). No other approvals are needed and there is nothing to stop construction of the apartment complex, but for this permit and its requirements, namely a 404 permit with 401 water quality certification.

Finally, Respondents question the Town's legal responsibility for the quality of the water leaving Cary Lake. Again, the only evidence in the record on this point is the testimony of Richard Thomas, testifying on behalf of the Town of Arcadia Lakes, stating the Town's responsibility for the water quality under NPDES. (See citations to testimony in standing section of Petitioners' Brief). The Respondents have not presented any testimony, evidence or law to contradict the testimony regarding the Town's responsibility for the quality of water leaving Cary Lake. The Town's has responsibility for managing stormwater runoff to protect water quality pursuant to the Water Quality Act of 1987 (P.L. 100-4). In recognition of stormwater runoff as a significant source of water pollution and the 1972 Clean Water Act's failure to control it, Congress amended

the CWA with the Water Quality Act of 1987 to require municipalities to obtain NPDES permit coverage for their stormwater discharges. CWA § 402(p). It is under this authority from which the Town's responsibility derives.

On the evidence of record before the Administrative Judge, the Town had clearly demonstrated a basis for standing separate and distinct from that of its citizens.

Respectfully submitted,



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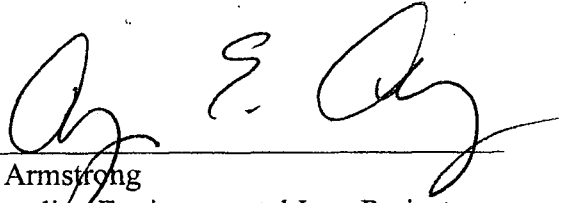
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The undersigned does hereby certify that this Final Reply Brief complies with SCRAP Rule 211(b).



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February 25, 2011

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 09-ALC-07-0069-CC

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson,
Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker,
Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey,
Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D.,
Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, . Petitioners/Appellants,

vs.

South Carolina Department of Health and Environmental Control
and Roper Pond, LLC, ... Respondents.

PETITION FOR REHEARING OF
APPELLANTS

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SC Court of Appeals

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INTRODUCTION

Pursuant to Rule 221(a) and Rule 240(i), SCACR the Appellants Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Jr., Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown respectfully petition this Court for a rehearing of its Opinion No. 5059, dated March 6, 2013.

SUMMARY OF GROUNDS FOR REHEARING

The Appellants respectfully submit that the Court overlooks or misapprehends the following particular points at issue in this appeal from the decision of Administrative Law Court (ALC):

1. The Court misapprehends the well-established law on standing in environmental cases by:
 - a. creating a new standard requiring property ownership in order to establish an injury in fact;
 - b. overlooking the S.C. Supreme Court's decision in Smiley v. DHEC, 374 S.C. 326649 S.E.2d 31 (2007) and others recognizing aesthetic and recreational interests as sufficient to confer standing; and
 - c. requiring proof of success on the merits, or proof of a future violation, to establish the causal connection necessary for standing.
2. The Court, while agreeing with Appellants that DHEC's review goes beyond the activity authorized by the Corps' NWP and that DHEC did not undertake that

review, overlooks the implications of these conclusions in the following respects:

- a. The Court's conclusions are in direct conflict with the ALC's conclusion that DHEC has no authority to consider impacts from the overall project;
- b. The Court's conclusions warrant remand to DHEC for consideration of the impacts of the "overall project" in light of information that waters of the State will be impacted beyond the impacts authorized by the NWP;
- c. The Court's preliminary conclusions should have led the Court to ultimately conclude that Roper Pond does not have a valid water quality certification because the project includes impacts beyond those authorized by the NWP certification and DHEC undertook no review of those impacts;
- d. DHEC erred in granting Roper Pond coverage under the State General Permit because Roper Pond did not have a valid 401 certification and thus did not have a valid 404 permit, as required for said coverage.

STANDARD FOR REHEARING

The purpose of a petition for rehearing is to "aid the court in deciding correctly a case heard by it." Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234, 238 (1933) (explaining that petitions for rehearing are often "dismissed with a simple order to that effect, for the reason that they contain nothing but a "rehash" of what the losing party has said before, matters which the court has already considered well and disposed of."). Rehearing is warranted when the Court has overlooked or misapprehended an argument. Kennedy v. S.C. Retirement

System, 349 S.C. 531, 564 S.E.2d 322 (2001). "In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument." Id. at 532, 564 S.E.2d at 322. When the Court fails to address some of the arguments raised in the appeal, "a *prima facie* case for rehearing has been made." Covar v. Sallat, 22 S.C. 265, 272 (1885).

SUMMARY OF ARGUMENT

The Court's Opinion is in direct contradiction to the South Carolina Supreme Court and United States Supreme Court's decisions on standing, which will surely lead to confusion and likely have far-reaching implications for citizens and municipalities in their efforts to protect the aesthetic, recreational and environmental qualities of their neighborhoods. The Opinion injects a new requirement for injury in fact that a Plaintiff have a property interest in the area over which the challenged activity will occur. The Opinion further injects a requirement for causal connection that a Plaintiff prove success on the merits, or a future violation. Neither of these standards have been applied by any court, indeed, both federal and South Carolina courts hold the contrary.

The Court's Opinion agrees with Appellants' arguments that DHEC has broad authority to consider the "overall project," including impacts beyond those specifically authorized by an NWP, but then overlooks how those conclusions impact the certification and General Permit coverage at issue in this appeal.

ARGUMENT

I. The Court's Opinion Misapprehends the Law of Standing

A. The Court Injects a New Test for Injury-in-Fact

The Court's Opinion cites the correct test for standing, but then injects a new requirement that an Appellant must have a property interest in order to establish standing. The Court holds that "similar to what we noted in our discussion about the Kaminer Station Appellants, **the complaints of the Cary Lake Appellants primarily concern Roper Pond and Cary Lake, both of which are privately owned and maintained by parties other than Appellants, and are thus not injuries in fact.**"¹ (Shearhouse Adv.Sht. at 51). The Court applies the same requirement to the Town, rejecting as a basis for standing the Town's interest in Cary Lake, based on the fact that "the Town ha[s] no ownership interest in Cary Lake."² (Shearhouse Adv.Sht. at 49). The addition of this new, heightened standard for injury in fact overlooks and misapprehends the numerous South Carolina appellate court decisions, as well as Fourth Circuit and U.S. Supreme Court cases adopted in South Carolina, finding standing on nearly identical allegations of harm to aesthetic or recreational interests.

The Court's Opinion appears to acknowledge that the Kaminer Station Appellants will suffer some injury-in-fact ("The ALC found the Kaminer Station Appellants failed to establish either an injury in fact from the permitting decision or a causal connection between the challenged decision and their alleged injuries. We agree with the ALC **to the extent that it found that Appellants have failed to establish any injury that would be traceable to the permitting decision.**" (Shearouse Adv.Sht. No. 11 at 49)). The Opinion cites to the "visual

¹Interestingly, when it comes to Elaine Starr's testimony, the Court overlooks the fact that Mrs. Starr, who lives on Cary Lake and is a member of the Cary Lake Homeowners Association, who owns Cary Lake, which is the receiving water body for Roper Pond's stormwater.

²Further, the Court adopts, and does not correct, the ALJ's exclusive reliance on whether the Town possesses an ownership interest in Cary Lake and Roper Pond. See Final Brief, p. 41.

appeal of Roper Pond” discussed by Mrs. Jackson. (Shearhouse Adv.Sht. at 50). The Opinion acknowledges that Mrs. Jackson’s aesthetic and recreational interests are exactly the type of injury that courts have found sufficient to establish standing. (Id.) (citing Pye v. U.S., 269 F.3d 459, 469 (4th Cir. 2001)). Indeed, Mrs. Jackson testified that she has walked or run past the pond “thousands and thousands” of times and has enjoyed seeing the pond nearly every day over the 37 years that she has lived in the Forest Lake Community. (R. p. 373). She described the pond as “absolutely beautiful.” (R. p. 374).

Elaine Starr, who lives on Cary Lake testified that she also enjoyed viewing the lily pad pond and said it is “absolutely gorgeous.” (R. p. 400). She said there are “white blooms, pink blooms, and you can see lots of life around it, like dragonflies” and that it is an aesthetic part of the community. (R. pp. 400; 413). She testified that if the pond is dredged there will be loss of a lot of life in the sediment itself and the lilies she enjoys seeing will not be there. (R. p. 401).

The Order further overlooks the testimony related to the Town’s aesthetic interests in the attractiveness of the Town upon entering and seeing the lily pad pond. Town Mayor Richard Thomas testified as to the Town’s aesthetic interest in this project, and that testimony was undisputed. (R. pp. 822-23). This aesthetic interest in and of itself is sufficient to confer standing, and the Court’s Opinion plainly overlooks this fact.

The Opinion appears to recognize that aesthetic and recreational interests are sufficient to establish an injury-in-fact in citing Sea Pines, but then inexplicably the Court inserts a new

standard requiring Plaintiffs to have property rights in the areas over which an environmental permit is sought, citing Conservation Council of N.C. v. Costanzo, 505 F.2d 498 (4th Cir. 1974). Costanzo stands for the proposition that an injury-in-fact cannot be *assumed* when the challenge involves private property. But in this case, Appellants did not expect the ALC or this Court to *assume* anything. Rather, the Appellants put forth evidence of injury in fact in the form of harm to recreational and aesthetic interests, similar to that alleged in Smiley v. SCDHEC, 374 S.C. 326, 649 S.E.2d 31 (2007); Pye v. U.S., 269 F.3d 459, 469 (4th Cir. 2001); Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); Friends of the Earth, Inc. v. Laidlaw Envt. Servs. (TOC), Inc., 528 U.S. 167, 120 S.Ct. 693 (2000); American Canoe Assn. v. Murphy Farms, 326 F.2d 505 (4th Cir. 2003). Even the court in Costanzo noted that the “claimed injury need not be great or substantial; an ‘identifiable trifle’, if actual and genuine, gives rise to standing.” Id. at 501 (citing SCRAP, 412 U.S. 669, 687-689, n. 14, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973)). Not only did the Appellants identify harm to their aesthetic and recreational interests, each of Appellant groups went on to describe even more injuries that would result directly from the development project at issue in this appeal: degraded water quality as a result of the project; sedimentation to Cary Lake and harm to the Gills Creek watershed, which is already impaired; impact on Cary Lake because of the increased density; impact to the character of the Town; diminished property values; the environmental quality of the Town; and increased crime, traffic and congestion as a result of the project. Certainly these allegations are

more than an “identifiable trifle” needed for standing.³

In contrast to this Court’s holding, South Carolina courts have regularly found environmental plaintiffs to have standing, despite the fact that an activity occurs on another’s private property. In S.C. Wildlife Fed’n v. S.C. Coastal Council, the Court held that the appellants adequately alleged an individualized injury in the adverse effect of a certification decision on their members’ use and enjoyment of wetlands proposed for dredging on a private development site. 296 S.C. 187, 371 S.E.2d 521 (1988). In Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision), the Court held that plaintiffs that live adjacent to a privately owned wetland had standing to challenge the issuance of a permit to fill the wetland because the permit would adversely affect their use and enjoyment in viewing the wetland and surrounding wildlife. 332 S.C. 551, 505 S.E.2d 598 (Ct. App.1998). In Spectre v. DHEC, the Court upheld Appellants challenge to the filling of 32 acres of “isolated” wetlands on private property. 386 S.C. 357, 368, 688 S.E.2d 844, 850 (2010).

Further, our courts have long held that precisely the type of aesthetic and recreational interests at stake here are sufficient to confer standing. In Smiley the Supreme Court held that a plaintiff must make claims as to “use and enjoyment” of an affected area. Smiley v. S. Carolina Dept. of Health & Envtl. Control, 374 S.C. 326, 333, 649 S.E.2d 31 (2007). In that case, the Court found that “interference with Smiley’s enjoyment of the beach, and his inability to use it

³The Court appears to equate these allegations of harm with a requirement for proof on the merits. See Section I.C. below.

for his rehabilitative jogging for at least six months a year for at least the next five years, are sufficient allegations of a 'stake in the outcome' to permit Smiley standing to challenge the permit." *Id.* (citing U.S. v. SCRAP, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973)).

The Court's holding that Appellants' lack of property right or interests in Roper Pond (or Cary Lake) precludes an injury in fact is not only contrary to the law of standing, it leads to the result that only those with property interests have standing. The practical effect of the Opinion is that only the Applicant/site owner would have standing to challenge a project. That cannot and has never been the law in South Carolina.

B. As to the Town, the Court Further Misapprehends Injury-in-Fact

In addition to imposing a property right requirement on the Town, the Court further misapprehends the relationship between the challenged project and the Town's obligations under the Clean Water Act. In arguing standing to this Court, the Town asserted its interest in complying with federal law – that is, in complying with the Town's Clean Water Act NPDES permit. This Court rejected that interest as a basis for standing, concluding: "We have found nothing in [33 U.S.C. § 1342, the authority cited by the Appellants,] either requiring a municipality to obtain a permit for stormwater discharges from a stormwater system that is already covered by a permit or holding a municipality responsible for such discharges." (Shearouse Adv. Sht. at 49, n.11).

Contrary to this Court's conclusion, the Town is required to have an NPDES stormwater

permit that imposes a continuing duty to comply with certain standards and limitations, and subjects the town to liability/responsibility if it fails to do so. 33 U.S.C. § 1342(p)(4) ("the Administrator shall establish regulations setting forth the permit application requirements for [MS4] stormwater discharges . . . Any such permit shall provide for compliance as expeditiously as practicable"). The project challenged in this action has the distinct potential to detrimentally impact the Town's ability to comply with those standards and limitations, which is a sufficient interest for municipal standing under the authority cited in the Appellants' Final Brief. See Final Brief, p. 39-41. The Court overlooks the Town's responsibility under the Clean Water Act's NPDES program.

Stormwater runoff is surface water generated by precipitation events, such as rainstorms, which flows over streets, parking lots, commercial sites, and other developed parcels of land. Whereas natural, vegetated soil can absorb rainwater and capture pollutants, paved surfaces and developed land can do neither. In urban settings like Arcadia Lakes, stormwater runoff is collected through storm drains and pipes, and is channeled through a storm sewer system. These storm sewer systems are known under the CWA as Municipal Separate Storm Sewer Systems (MS4s). The Town of Arcadia Lakes operates an MS4 to collect and channel stormwater. See (R. p. 822, 828, 844). This MS4 collects stormwater from Roper Pond's property. See (R. pp. 828; Shearhouse Adv.Sht. at 39).

Under the Clean Water Act, MS4s fall under the definition of "point sources." See 33

U.S.C. § 1362(14). The CWA generally prohibits the discharge of any pollutant from a “point source” into the navigable waters of the United States unless the point source is covered by an NPDES permit. See, 33 U.S.C. §§ 1311(a), 1362(12)(A)); Defenders of Wildlife v. Browner, 191 F.3d 1159, 1163 (9th Cir. 1999). MS4s are no exception – a municipality operating an MS4 that discharges into navigable waters must comply with the NPDES permit program.⁴ See, 33 U.S.C. § 1342. Arcadia Lakes operates such an MS4. See (R. p. 822, 828).

The NPDES component of the CWA requires municipalities to obtain permits that place limits on the type and quantity of pollutants that can be released from an MS4. See, 33 U.S.C. § 1342(a), (p). Particularly, an NPDES permit requires its holder, the municipality, to comply with certain effluent limitations, water-quality standards, water monitoring obligations, public reporting mechanisms, and discharge requirements. See, 33 U.S.C. §§ 1342(a), 1311, 1312, 1314, 1316, 1317, 1318, 1343. Under this framework, **the Town of Arcadia Lakes operates an MS4 that necessitates an NPDES permit and requires compliance with NPDES standards and limitations.** See (R. pp. 828, 844). Arcadia Lakes thus has a significant interest in the quality of stormwater runoff entering its storm drains and pipes, and flowing through its MS4. This includes stormwater from Roper Pond’s development. See (R. pp. 828).

When an MS4 operating municipality does not comply with the NPDES requirements, that municipality is subject to suit and liability under the CWA, which can be initiated by either

⁴Some small MS4s do not have to comply with NPDES, but that exception is not relevant here.

the government or private citizens. See, e.g., Env'tl. Conservation Org. v. City of Dallas, 529 F.3d 519 (5th Cir. 2008); Natural Res. Def. Council, Inc. v. County of Los Angeles, 673 F.3d 880 (9th Cir. 2011). Particularly, under the CWA citizen-suit provision, federal courts are authorized to enter injunctions and assess civil penalties, payable to the United States Treasury, against any municipality found to be in violation of “an effluent standard or limitation” under the CWA. See, 33 U.S.C. § 1365(a); Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc., 528 U.S. 167, 175 (2000). Further, as to an MS4, the CWA “does not distinguish between those who add and those who convey what is added by others—the Act is indifferent to the originator of water pollution.” Natural Res. Def. Council, 673 F.3d at 900. In other words, if stormwater from Roper Pond causes the Town’s MS4 to be noncompliant, the Town itself is liable.

With this more thorough outline of the NPDES framework, it is plain to see that the Town has an interest in this litigation sufficient for standing under the authority outlined in the Appellants’ briefs. This interest is whole and apart from those of the Town’s citizens and the individual Appellants, and has a direct causal connection to the activities that triggered the DHEC permitting requirement at issue in this case.

C. Causal Connection Does Not Require Proof on Merits or Proof of a Potential Future Violation

In this case, the causal component of standing requires that the Appellants’ injury-in-fact be “fairly traceable to the challenged action,” i.e., Roper Pond’s permitted construction activities

– activities including excavation of the pond. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130 (1992). In contrast, this Court's Opinion requires that the Appellants' injury-in-fact be fairly traceable to a violation or noncompliance on the part of Roper Pond. In short, the Opinion requires that the Appellants prove the merits of the case in order to prove standing. The Appellants offered testimony, especially through Mrs. Jackson, Mrs. Starr and Mr. Thomas, that when the pond is excavated, as will happen under the permitted project, their enjoyment in viewing the pond and related activities would be eliminated – they would be injured for purposes of standing. (R. p. 374-376 & 401). This Court rejected those injuries on the basis of causation, because the Court concluded the Appellants could not prove that the permitted BMPs were inadequate (Shearhouse Adv.Sht. at 49) or that Roper Pond would violate the terms of its permit in the future (Shearhouse Adv.Sht. at 50). Proof of the merits of this case is a wholly separate issue from whether the activities that are part of the challenged project – in this case the excavation of the pond – bear a causal connection to the Appellants' injury-in-fact.

This Court's misapplication of the causation principle is perhaps best illustrated by analogy to a similar case. In Duke Power Co. v. Carolina Env'tl. Study Group, Inc., the merits of the case involved the validity of the provisions of the Price-Anderson Act, which limited maximum liability in the event of any single nuclear incident to \$560,000,000. 438 U.S. 59 (1978). The plaintiffs, who lived near the proposed construction site for two nuclear power plants, challenged the constitutionality of that Act. Id. at 67. For purposes of standing, the

plaintiffs asserted injuries related to the possibility of a nuclear accident, as well as injuries related to the normal operation of the plants. Id. at 73-74. First of all, the Supreme Court concluded that it need not determine whether the injuries based on the possibility of a nuclear accident were “sufficiently concrete to satisfy constitutional requirements.” Id. at 73. Rather, “several of the ‘immediate’ adverse effects” of the nuclear plants, including “environmental and aesthetic consequences” were of “the type of harmful effect which has been deemed adequate in prior cases.” Id. at 73-74. In the same way, while the Appellants have asserted injuries related to future permit noncompliance or insufficiency, the Appellants have also asserted immediate adverse effects resulting from completion of the permitted activity.

As to causation, the Duke Power Court applied a but-for standard. Id. at 74-75. The plaintiffs position on causation was that but for the Act’s limitation on liability, the nuclear plants would not be constructed, and the “immediate adverse effects” would then not occur. Id. at 74. The Court found a “substantial likelihood” of this “but for” relationship, and upheld causation and standing. Note that actual operation of the nuclear plants was not an issue on the merits, yet formed the basis for plaintiffs’ standing. **The plaintiffs’ injuries in fact had nothing to do with the plaintiff’s constitutional claims, and the Court found that no such nexus was required.** Id. at 78. In the same way, the Appellants have identified aesthetic and recreational injuries that would not occur but for the permit at issue in this case. Those injuries form a sufficient basis for standing, apart from any reference to the merits of the case.

Instead of applying this but for analysis, the Court's Opinion instead sets a new standard of requiring Appellants to prove success on the merits (or that a violation of the permit is certain to occur) to meet the causal connection. Proof of the merits of the case is a wholly separate question from whether the activities facilitated by the challenged permit, including excavation of the pond, will lead to injury-in-fact. Indeed, courts regularly find that a project fully complies with the regulatory requirements, but that the plaintiff had standing to challenge the decision.

Mrs. Jackson and Mrs. Starr testified that if the pond were excavated, their enjoyment in viewing the pond would be gone. (R. pp. 374-376 & 401). The Town asserted its interests in the attractiveness of the Town based on the aesthetics of the lily pad pond upon entering the Town (R. pp. 822-23) – an allegation nearly identical to that described in Sausalito v. O'Neill, 386 F.3d 1186, 1197-98 (9th Cir. 2004). These aesthetic and recreational injuries have a but-for causal connection to the permit at issue in this case. And the Court need not engage in any degree of speculation to reach such a conclusion – if the permit stands, the pond will be excavated and these “immediate adverse effects” will occur.

The Opinion focuses its “causal connection” discussion on Jackson's concern about how the site would be managed, in light of her past experience with permit violations. The Opinion wholly overlooks her concern, along with Mrs. Starr's, about not being able to view and enjoy the pond and its attendant wildlife, which the Court earlier concedes are injuries in fact. The requisite causal connection is established through uncontroverted evidence that the lily pads and

wildlife will be eliminated by the excavation of the pond, coupled with the asserted use and enjoyment of viewing the pond and its wildlife. There is a direct link between the excavation of the pond and the injuries complained of by Mrs. Jackson, Mrs. Starr, and Mr. Thomas, i.e., loss or decrease of aesthetic and recreational interests.

Similarly, when assessing Mrs. Starr's testimony, the Court applies a heightened test for demonstrating a "causal connection," stating that "granting coverage for Roper Pond Apartments under the State General Permit" would not "cause an actual or imminent injury." (Shearhouse Adv. Sheet at 51). In so doing, the Court is requiring the exact type of nexus between merits and injury-in-fact that was flatly rejected in Duke Power Co. v. Carolina Env'tl. Study Group, Inc., 438 U.S. at 78. The question of adequacy of the Best Management Practices ("BMPs") goes to the merits of the case, not to standing, and the Appellants do not have the burden of proving that the BMPs are insufficient in order to establish standing. Just like with Mrs. Jackson, the Court imposes a requirement that Mrs. Starr prove either a future violation (that the project would be mismanaged) or success on the merits (that the SWPPP was insufficient). Both of these questions go far beyond the requirement that an injury in fact be "fairly traceable" to the challenged activity as described in Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130 (1992).

A plaintiff need only show that he or she will suffer some "identifiable trifle" of injury. In applying this standard, the court in Pye v. U.S. noted that if "**the Residents do not have**

standing to protect the historic and environmental quality of their neighborhood, it is hard to imagine that anyone would have standing to oppose this ... grant.” 269 F.3d 459, 468 (4th Cir. 2001) (citing Society Hill Towers Owners’ Assn. v. Rendell, 210 F.3d 168, 176 (3rd Cir. 2000)). If those who are seeking to protect the environmental quality of the areas they use do not have standing, then “the requirement for . . . public input would be little more than a meaningless procedural calisthenic that would provide little or no protection to those most directly affected by the governmental action.” Id.

Standing in Pye was not based on the regulatory or technical sufficiency of the permitted activity, but rather on a but for relationship between the permitted activity and the alleged harm. Id. at 468-69. Similarly, in this case the Appellants do not need to offer evidence on the technical sufficiency of the SWPPP in order to establish an injury-in-fact, they merely need to make allegations of any injury that is “fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.” Smiley v. South Carolina Dept. of Health and Environmental Control, 374 S.C. 326, 649 S.E.2d 31 (2007) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561, 112 S.Ct. 2130 (1992)).

Appellants did just that by alleging that they enjoy and benefit from viewing the pond and observing wildlife, and that if the pond were excavated as will occur by way of this challenged decision, their benefit and enjoyment would be lessened.

II. Validity of the 401 Certification and General Permit Coverage

A. The Court Misapprehends Appellants Arguments on Applicability of

DHEC's 401 Certification of the NWP to Excavation of the Pond

The Court characterizes the Appellants argument as contending that “the 401 certifications that DHEC issued for projects authorized under NWP 29 or NWP 39 could not apply to the excavation of the pond because that activity was *not disclosed* when Roper Pond applied to the Corps for a 404 permit.”⁵⁵ (Shearhouse Adv. Sht. at 52) (emphasis added). The Court misapprehends Appellants argument. The basis of the Appellants legal challenge is not simply that Roper Pond failed to disclose the excavation, though this had this deficiency not occurred DHEC would have had the information regarding the overall impacts. Rather, Appellants assert that 1) the NWPs only cover certain clearly defined activities; 2) DHEC’s NWP certifications further limit those activities by requiring projects to comply with general conditions; 3) in order to receive coverage under DHEC’s NWP certification the **activity must be limited to the impacts authorized by that certification and must meet the general conditions**; 4) the general conditions require DHEC to review the “overall project,” not review of “only the land area directly impacted by the NWP;” and 5) when the impacts to wetlands and waters go beyond the defined impacts authorized by the NWP certification, as they admittedly

⁵⁵Appellants suggest that the failure to disclose requested information on a permit application where the applicant certifies that the “information in this packet is complete and accurate” at a minimum casts doubt on the credibility of this witness as it relates to statements made regarding this application process. (R.pp. 553-54).

do in this case, they are not covered by DHEC's NWP certification.

This Court's Opinion recognizes DHEC's broad authority to review impacts that go beyond those authorized by the specific NWP in concluding that DHEC must review the "overall project proposed" by the developer. (Shearhouse Adv. Sht. at 52). Alterations or impacts to wetlands and waters beyond those defined in the NWPs are not covered by DHEC's 401 certifications of NWPs. (R. p. 603, lines 8-10).

In order to determine whether a project meets the conditions of DHEC's NWP certification, DHEC must conduct a review and affirmatively conclude that the conditions are either met or not. The point is that excavation of the pond is not contemplated by or authorized under DHEC's NWP certification. The General Conditions of the NWP certifications, and Regulations 61-68 and 61-101,⁶ require DHEC to review impacts beyond those authorized by the specific NWP, specifically excavation of the pond. Indeed, this Court effectively agrees with that argument.

⁶Regulation 61-10 requires DHEC to consider: "whether there are feasible alternatives to the activity; . . . all potential water quality impacts of the project, both direct and indirect, over the life of the project, including physical, chemical, and biological impacts, including: (1) impact on existing and classified water uses; (2) physical, chemical, and biological impacts, including cumulative impacts; (3) the effect on circulation patterns and water movement; (4) the cumulative impacts of the proposed activity and reasonably foreseeable similar activities of the applicant and others." S.C. Code Ann. Reg. 61-101.F.(3). Regulation 61-68 water quality standards require the maintenance and propagation of a balanced, indigenous aquatic community of fauna and flora. S.C. Code Ann. Reg. 61-68.A.(4). The water quality standards also require DHEC to "maintain and improve all surface waters to a level to provide for the survival and propagation of a balanced indigenous aquatic community of flora and fauna . . ." S.C. Code Ann. Reg. 61-68.A.(4).

B. The Court Agrees with Appellants that the General Conditions of the 401 Certification Authorize DHEC to Review the "Overall Project," Including Excavation of the Pond, But Overlooks the Legal Effect of Its Conclusion

The Court's Opinion correctly notes that DHEC's 401 certifications for those general permits, or Nationwide Permits, "include general conditions that a given project must meet, including the requirements that DHEC . . . would consider not only the land area directly impacted by each NWP request, but also impacts to adjacent water bodies or wetlands resulting from the activity."⁷ (Shearouse Adv.Sht. No. 11 at 41). The Opinion also cites the Corps of Engineers' requirement that in order for the project to be valid under NWP 39, it "had to comply with the general conditions of the NWP, regional conditions, and **certain special conditions**, . . . including 'all appropriate state certifications and/or authorizations (i.e. 401 Water Quality Certification' . . ." (Id. at 42). The Court holds that DHEC is required to "review the 'overall project proposed by a single owner/developer,' 'includ[ing] all land within the project bound by single ownership,' and is not confined to 'the land area directly impacted by each NWP request.'"⁸ (Shearhouse Adv. Sht. at 52). The Court further agrees with the Appellants "that no one at DHEC undertook a complete examination of the impact of the project on all waters and ~~_____The Court takes a limited view of the "activity,"~~ apparently interpreting "activity" to mean only the fill, yet the General Permit Coverage is a Stormwater Permit for construction activities, and is not limited to review of wetland fill. In addition, the Water Quality Certification Regulations, and the conditions of the 401 Certifications, require a broad review to include considerations beyond simply the wetland fill.

⁸This Court's statement that "the 401 certification that DHEC issued for this NWP 29 satisfied the water quality certification requirement for a 404 permit" (Shearhouse Adv. Sht. at 54), is in direct conflict with the Court's conclusion that DHEC must look at the overall project site, not just the lands covered by the NWP, and that it failed to do so.

wetlands at the project site or determined if feasible alternatives were available,” as required by the certification conditions. (Id.) Then the Court’s Opinion fails to take the next logical step, which is that Roper Pond does not qualify for NWP certification because its project includes impacts on the overall project site that exceed the NWP certification and that it thus fails to comply with the NWP certification.⁹

Instead of taking the next logical step, the Opinion begins a discussion of federal law, and appears to make the assumption that because no Clean Water Act approval is needed for excavation of the lily pad pond, there is no requirements for State review and approval. This Court is correct that the Appellants have never alleged that a 404 CWA permit is needed for excavation. Clean Water Act authority is not at issue in this case. The South Carolina Supreme Court has directly addressed the question of whether State authority to regulate wetlands and waters exceeds Federal regulation under the Clean Water Act, and has expressly ruled that “federal [CWA] jurisdiction is not essential to [State] consistency review.” Spectre, LLC v. S. Carolina Dept. of Health & Envtl. Control, 386 S.C. 357, 368, 688 S.E.2d 844, 850 (2010).

While Spectre involved DHEC’s regulatory authority under the S.C. Coastal Zone Management Act and this case presents the question of DHEC’s regulatory authority under the S.C. Pollution Control Act, the parallel is that our Supreme Court has expressly ruled that South Carolina law can and does give DHEC broader regulatory authority than the Clean Water Act. The dredging

⁹Even DHEC admits that a “specific determination” is required to insure that a project meets the conditions of its NWP certification. (R. p. 609). If a project does not meet the specific and general conditions of the NWP certification, Hightower said DHEC requires an individual certification. (R. p. 253).

and excavation of wetlands are not activities regulated under Section 404 of the Clean Water Act; however, DHEC's review authority over dredging and excavating wetlands and waters of the State is not dependent on the Corps' jurisdiction. Rather, DHEC has broader review authority over waters of the State that derives from the Pollution Control Act, the 401 water quality certification regulations at R. 61-101 and the water quality standards at R. 61-68.¹⁰ And in this case, the conditions of DHEC's NWP certification expressly retain the agency's authority to review those impacts.

The Court's Opinion overlooks this argument that the DHEC NWP certification is broader than the Corps NWP approval. The Opinion points out that Appellants have not argued that alterations to the pond resulted from filling of the wetlands, and the Court is correct. This statement shows a fundamental misunderstanding of how the 404 and 401 programs relate to each other. There are two separate regulatory programs with two separate regulatory criteria and, in this case, two separate sets of conditions imposed on NWPs by each agency. Indeed, the Clean Water Act Section 1341(a)(1) cited in the Opinion specifically states that the State must certify that a discharge complies with "applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title." 33 U.S.C. § 1341(a)(1). Section 1313 requires states to adopt water

¹⁰Even DHEC's Chuck Hightower testified that the Water Quality Certification regulations are "pretty broad" and expressly require an assessment of all potential water quality impacts, both direct and indirect, over the life of the project, including cumulative impacts of the proposed activity. (R. p. 252; R. 61-101.F). Dr. Reice provided uncontested testimony that it will take ten years for the community to reestablish after the major disturbance, describing in detail the types of impacts that will result from the excavation on pp. 12-14 of Appellants Final Brief.

quality standards, and DHEC has promulgated those regulations in S.C. Code Ann. Reg. 61-68. 33 U.S.C. § 1313. DHEC also promulgated water quality certification regulations at S.C. Code Ann. Reg. 61-101. The Clean Water Act states that “[n]othing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements.” 33 U.S.C. § 1341(b). Yet that is exactly what the ALC and this Court have done – allow the Corps’ NWP to act as a limitation on DHEC’s authority to require compliance with State water quality requirements, despite the CWA’s clear language that it not be construed to limit State’s authority to include additional water quality requirements.

The Court acknowledges that DHEC did not conduct the overall review required by the NWP certification conditions, but does not hold DHEC accountable for its failure. If DHEC does not conduct some review to ensure that the project meets the conditions of the NWP 401 Water Quality Certification, and DHEC does not consider “all land within the project boundary under single ownership,” then the conditions applicable to the NWPs will be rendered superfluous.¹¹

The fact that this Court agrees that DHEC does have authority to review the “overall project” should warrant reversal of ALJ’s conclusion to the contrary (holding that DHEC has no

¹¹As a practical matter, DHEC could, in theory look at the Joint Federal and State Application and determine, if an applicant was forthright, whether the project exceeded DHEC’s certification authorization. Through that process DHEC could determine when it need to conduct an individual certification review because the project exceed what was authorized by the NWP certifications, as it should have done in this case.

authority to review the excavation portion of the project¹²) (ALC Order, R. p. 30). In addition to the internal conflict within the ALC's Order, there is a direct conflict between the ALC's Order and this Court's Opinion on the question of DHEC's authority.

Given the Court's agreement that DHEC is required to review the overall project, including all lands within the project area and not just the specific land impacted by the NWP, and the Court's agreement that DHEC failed to undertake this review, the Court should have remanded the case back to DHEC to undertake a review of the impacts resulting from excavation of the lily pad pond and impose any conditions necessary to protect water quality and the aquatic ecosystem of that State waterbody.

Given the Court's conclusion that DHEC must review the "overall project," and that DHEC did not undertake a "complete examination of the impact of the project on all waters and wetlands at the project site" (Shearhouse Adv. Sht. at 52), the Court necessarily should conclude that 1) the project fails to comply with the 401 Certification of NWP 39 and 2) DHEC should have either issued a certification denial letter or required an individual 401 certification review through which it could consider "all land within the project" given DHEC's knowledge that the pond – a water of the State¹³ – would be excavated.

¹²The ALJ's conclusion is in conflict with his finding that an individual 404 permit and accompanying 401 Water Quality Certification is required if a proposed activity does not meet the conditions of the 401 Water Quality Certification for the NWP. (R. p. 15, FF #27).

¹³The Pollution Control Act defines waters as "Lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic Ocean within the territorial limits of the State and all other bodies of surface or underground water, natural or artificial, public or private, inland or coastal, fresh or salt, which are wholly or partially within or bordering the State or within its jurisdiction." S.C. Code Ann. § 48-1-10(2).

C. The Court Overlooks the Requirement for a Certification Decision

It is precisely because DHEC was required to undertake some review of the “overall project proposed by” the developer, including review of “all land within the project boundary under single ownership,” which is not confined to “the land area directly impacted by each NWP request, DHEC necessarily had to arrive at some decision regarding compliance with those NWP certification conditions. DHEC’s failure to conduct the review and make a determination of whether the project meets the NWP conditions and qualifies for coverage is fatal, and Roper Pond thus lacks 401 certification.

D. The Court’s Conclusions Overlook the Implications on the Stormwater

General Permit Coverage

Section 2.1(C) of the NPDES General Permit provides as follows: “If a US Army Corps of Engineers’ 404 Permit is required by Section 404 of the CWA for permanent or temporary storm water control structures, DHEC may not grant coverage under this [General Construction Permit] until the 404 Permit has been issued and is effective.”¹⁴ (R. p. 487) **If the permittee fails to obtain his necessary state certifications and/or authorizations prior to beginning work, this would be considered a willful and knowing violation of the Clean Water Act.”** (R. pp. 555-562). The NPDES General Permit conditions expressly require that any Corps of

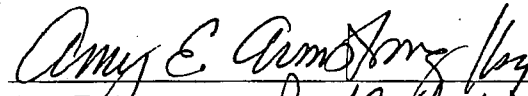
¹⁴ On June 30, 2006, the Department published a guidance document for the NPDES General Permit to be issued on August 1, 2006 (“Guidance Document”). (R. pp. 564-572). The Guidance Document noted that the new NPDES General Permit included a provision regarding the requirement of a Clean Water Act Section 404 permit for the proposed activities prior to coverage under the NPDES General Permit.

Engineers 404 permit required under the Clean Water Act be issued and effective prior to DHEC granting coverage under the NPDES General Permit. (R. p. 487). Because the project did not qualify for coverage under DHEC's NWP certification, it was not entitled to coverage under the General Permit. Thus, the Court erred in failing to conclude that DHEC improperly granted coverage under the General Permit for its failure to comply with the conditions of the NWP certification and consider the "overall project," specifically the excavation of the pond.

CONCLUSION

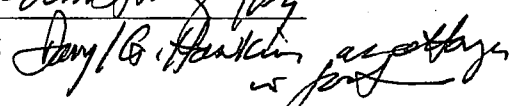
WHEREFORE, the Appellants respectfully request that this Court issue an Order granting Rehearing and reversing the Final Order and Decision of the Administrative Law Judge and concluding that Roper Pond, LLC does not have valid state approval for the dredging and excavation of the lily pad pond, and that the Appellants have standing to maintain this action.

Respectfully submitted,



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